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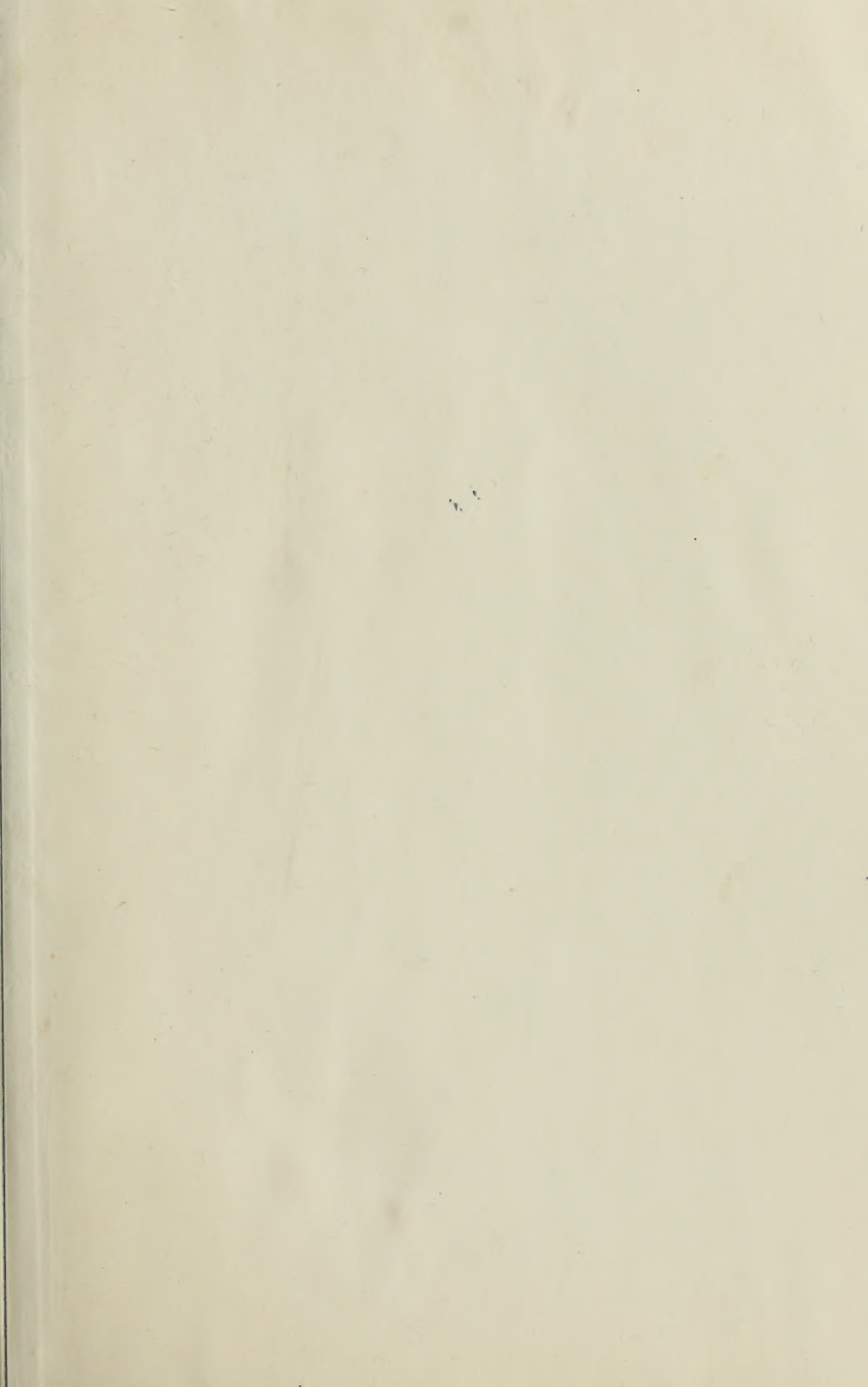
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1360

United States 1360

Circuit Court of Appeals

For the Ninth Circuit. /

THE UNITED STATES OF AMERICA on the
Relation of THOMAS W. MILLER, Alien
Property Custodian of the United States of
America,

Plaintiff in Error,

vs.

C. W. CLAUSEN, as State Auditor of the State of
Washington,

Defendant in Error.

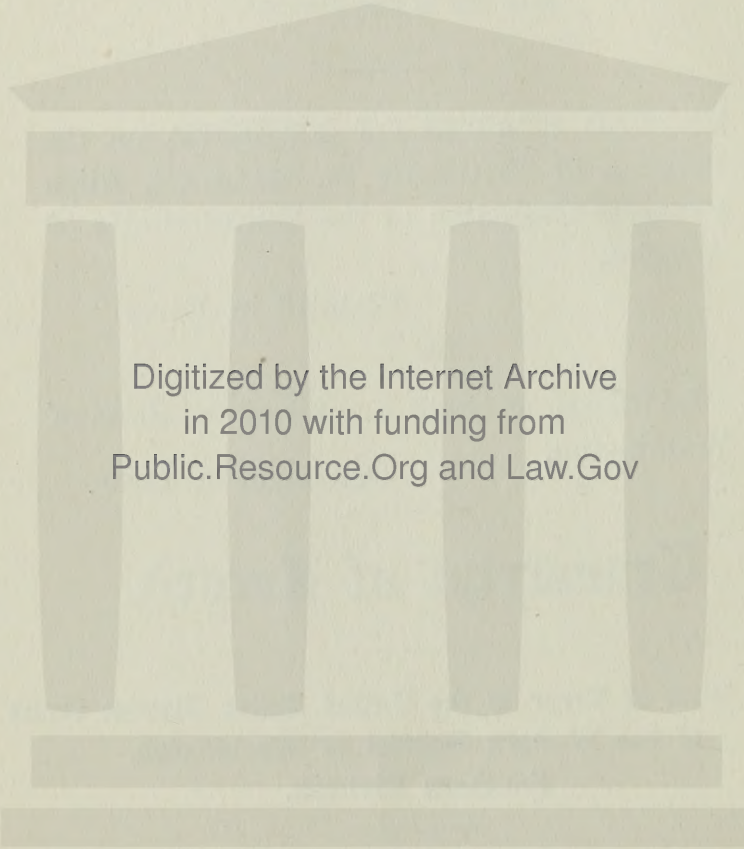
Transcript of Record.

Upon Writ of Error to the United States District Court
of the Western District of Washington,
Southern Division.

FILED

SEP 18 1923

F. D. MONKTON,
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

THOMAS P. REVELLE, Esquire,
United States Attorney, Federal Building,
Seattle, Washington.

W. W. MOUNT, Esquire,
Assistant United States Attorney, 324 Federal
Building, Tacoma, Washington.

HARRY G. ROWLAND, Esquire,
410 Equitable Building, Tacoma, Washington.

DIX H. ROWLAND, Esquire,
410 Equitable Building, Tacoma, Washington.
Attorneys for Plaintiff in Error.

JOHN H. DUNBAR, Esquire,
Attorney General, Temple of Justice, Olympia,
Washington.

M. H. WIGHT, Esquire,
Assistant Attorney General, Temple of Justice,
Olympia, Washington.
Attorneys for Defendant in Error.

GUIE & HALVERSTADT,
306 Marion Building, Seattle, Washington.
Of Counsel for Defendant in Error. [1*]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the
Western District of Washington, Southern
Division.

No. 4116.

THE UNITED STATES OF AMERICA on the
Relation of THOMAS W. MILLER, Alien
Property Custodian of the United States of
America,

Plaintiff and Relator,

vs.

C. W. CLAUSEN, State Auditor of the State of
Washington,

Defendant and Respondent,

Petition and Affidavit for Writ of Mandamus.

To the Honorable Judge of the above-entitled court:

Comes now the plaintiff and relator, above named,
and complaining of the above-named defendant and
respondent, alleges and says:

I.

That the above-named plaintiff is the duly appointed, qualified and acting Alien Property Custodian of the United States of America, appointed by the President of the United States under and by virtue of an act of Congress of the United States of America, known as the "Trading with the Enemy Act," passed on the 6th day of October, 1917, and the acts of Congress amendatory and supplementary thereto, possessing all the powers granted by said acts of Congress and the executive orders issued in pursuant thereof.

II.

That at all times herein mentioned, the defendant, C. W. Clausen was the duly elected, qualified and acting State Auditor of the State of Washington, and it is a part of his official duties to audit claims against the Accident Fund of [2] the State Treasury of the State of Washington, and to issue warrants thereon upon vouchers provided by the Department of Labor and Industries for claims against said fund that have been regularly passed upon and allowed by said Department of Labor and Industries; that said Accident Fund is under the control of the Director of Labor and Industries of the State of Washington and the Supervisor of Industrial Insurance of the Department of Labor and Industries of the State of Washington, who alone can authorize the issuance of vouchers against the said fund;

III.

That the said defendant and respondent is an inhabitant of this judicial district.

IV.

That prior to the commencement of this action, in the month of May, 1923, there was issued to the plaintiff and relator, a certain voucher for the sum of \$24,348, upon said Accident Fund for the payment of certain duly allowed claims named in said voucher; that said voucher was in due form and in accord with the rules and practices of said Department, the same having been issued by said Department in compliance with a judgment of this Court, made and entered November 1st, 1922, in a case in

which Thomas W. Miller, Alien Property Custodian was the plaintiff and Edward Clifford, as Supervisor of the Department of Labor and Industries of the State of Washington and another were defendants, and a judgment of the Circuit Court of Appeals made and entered on March 14, 1923, and a certain mandate of said last named court, entered thereafter by said District Court in the office of the Clerk thereof; that a copy of said voucher is hereto attached, marked Exhibit "A" and is made a part hereof. [3]

V.

That said voucher was filed with the said respondent on or about the date of its issuance by direction of said Department; that on the 26th day of May, 1923, the plaintiff and relator presented a copy of said voucher to the respondent who already had in his possession the original voucher, at the office of the State Auditor of the State of Washington and requested that he audit the same as a claim against said "Accident Fund" and issue to him the said Thomas W. Miller, Alien Property Custodian of the United States of America, a warrant upon said "Accident Fund" in accord with the terms of said voucher, which said requests were then and there refused; that said refusals were without warrant of law, arbitrary and in a matter in which said defendant had no discretion.

VI.

That the said plaintiff and relator has no plain, speedy or adequate remedy in the ordinary course of law.

VII.

That plaintiff desires said warrant that he may collect the same and distribute the funds represented thereby to those who shall be designated by acts of Congress to be entitled thereto and that he may perform his duties as an executive of the and representing the President of the United States and carry out the treaty obligations of the United States of America with the foreign governments whose subjects are interested therein.

VIII.

That the acts of said respondent in refusing to audit said voucher and issue said warrant are seriously interfering with plaintiff and relator in performing his official duties in carrying out the reconstruction problems resulting from the late war with Germany, Austria and Bulgaria and is [4] seriously interfering with the President of the United States of America whose representative relator is in carrying out the obligations and duties which he owes to claimants of and citizens of foreign governments with which the United States of America has treaty obligations to perform.

IX.

That plaintiff and relator as an executive official under the President of the United States of America has been interfered with, put to great expense, and damages by the arbitrary acts of said respondent above set forth.

X.

That Harry G. Rowland is the duly appointed,

qualified and acting representative of the plaintiff and relator.

WEREFORÉ plaintiff prays that an order of this Court shall be entered directed to said respondent requiring that he answer this petition; that an alternative writ of mandate shall issue directed to said defendant under the hand and seal of this Court requiring that he shall either forthwith audit said voucher and issue a warrant upon the Accident Fund of the State of Washington on said voucher to plaintiff in the sum of Twenty-four Thousand Three Hundred Forty-eight (\$24,348) Dollars, or that he shall show cause before this Court at a date to be designated by the Court why he has not done so.

That upon the return of said alternative writ that a peremptory writ shall issue to the defendant directing him to audit said voucher and issue said warrant; that plaintiff shall recover of and from the defendant his costs and disbursements herein sustained.

THOMAS W. MILLER,

Alien Property Custodian of the United States of
America.

By HARRY G. ROWLAND,

His Representative.

H. G. & DIX H. ROWLAND,

Attorneys for Plaintiff, 410 Equitable Building,
Tacoma, Washington. [5]

State of Washington,
County of Pierce,—ss.

Harry G. Rowland, being first duly sworn, on oath deposes and says: that he is the duly appointed, qualified and acting representative of Thomas W. Miller, Alien Property Custodian of the United States of America, the plaintiff and relator in the above-entitled action; that he has read the foregoing affidavit and complaint, knows its contents, and that the same is true;

That affiant makes this affidavit for and on behalf of the plaintiff and relator above named.

HARRY G. ROWLAND.

Subscribed and sworn to before me this 31st day of May, 1923.

[Seal]

CHAS. W. STEWART,

Notary Public in and for the State of Washington,
Residing at Tacoma.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jun. 8, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [8]

[Title of Court and Cause.]

No. 4116.

Order for Alternative Writ of Mandamus.

This cause coming on to be heard this 8th day of June, 1923, upon the application of the plaintiff and

relator above named for an order of Court directing that there shall issue an alternative writ of mandamus in accord with the prayer of the petition and affidavit on file in the above-entitled action, and it appearing to the Court that prior to the commencement of this action in the month of May, 1923, there was issued to the plaintiff and relator a certain voucher for the sum of \$24,348 upon the "Accident Fund" of the State of Washington for the payment of certain duly allowed claims named in said voucher, due to former alien enemies of the United States of America; that said voucher was in due form and in accord with the rules and practices of the Department of Labor and Industries of the State of Washington, the same having been issued by said Department in compliance with a judgment of this Court made and entered November 21st, 1922, in a case in which Thomas W. Miller, Alien Property Custodian, was the plaintiff, and Edward Clifford, Supervisor of the Department of Labor and Industries of the State of Washington and another were defendants, and a judgment of the Circuit Court of Appeals made and entered March 14, 1923, and a certain mandate of the said last- [9] named Court made and entered thereafter by this Court in the office of the Clerk thereof, a copy of which voucher is attached to the original affidavit and complaint herein, is marked Exhibit "A" and is made a part thereof, that said voucher was filed with respondent on or about the date of its issuance by direction of said Department and directed that the said respondent should issue to Thomas W.

Miller, Alien Property Custodian of the United States, a warrant upon the Accident Fund of the State of Washington in the sum of \$24,348 in payment of said claims; that the said plaintiff and relator presented said voucher to the State Auditor of the State of Washington prior thereto, requesting that he audit the same and issue to Thomas W. Miller, Alien Property Custodian, plaintiff and relator, a warrant upon said Accident Fund in accord with the terms of said voucher which requests were refused; that said refusals were without warrant of law, arbitrary and in a matter in which the said respondent has no discretion; that the plaintiff and relator has no plain, speedy or adequate remedy in the ordinary course of law.

IT IS THEREFORE ORDERED that a writ of defendant shall be served with a copy of the original affidavit and petition in the above-entitled case and shall answer the same;

IT IS FURTHER ORDERED that a writ of mandamus shall issue under the hand and seal of the above-entitled court, directed to the said C. W. Clausen as State Auditor of the State of Washington, the respondent above named, requiring that he shall forthwith audit the said voucher above referred to and shall issue to Thomas W. Miller, Alien Property Custodian of the United States, a Warrant upon the Accident Fund of the State of Washington in payment of the claims described in said voucher, or that he shall show cause before this Court on the 25th day of June, 1923, at the courtroom thereof in the courthouse of the United

States District Court in the city [10] of Tacoma, in Pierce County, Washington, why he has not done so; that a copy of such writ shall be served upon the defendant and respondent at least ten (10) days before the return day of said alternative writ, together with a copy of the original affidavit and complaint in this action.

IT IS FURTHER ORDERED that service of the affidavit and complaint and of said alternative writ may be made either by the United States Marshal for this District, or the Sheriff of Thurston County, Washington, in like manner, as a summons in a civil action is served.

Done in open court this 8th day of June, 1923.

EDWARD E. CUSHMAN,

Judge of the District Court of the United States
for the Western District of Washington,
Southern Division.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jun. 8, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [11]

[Title of Court and Cause.]

No. 4116.

Alternative Writ of Mandamus.

The United States of America to C. W. Clausen,
State Auditor of the State of Washington,
defendant and respondent, GREETINGS:

WHEREAS, it appears by the affidavit and verified petition of Harry G. Rowland, representative

of Thomas W. Miller, Alien Property Custodian of the United States, the plaintiff and relator above named and the party beneficially interested herein, that the plaintiff and relator is the holder of a certain voucher for the sum of \$24,348 drawn to the Auditor of the State of Washington against the "Accident Fund" so called, for the payment of duly allowed claims named in said voucher; that said voucher was in due form and in accord with the rules and practices of the Department of Labor and Industries of the State of Washington, the same having been issued by the said Department in compliance with the judgment of this Court, made and entered November 1st, 1922, in a case in which Thomas W. Miller, Alien Property Custodian of the United States was the plaintiff, and Edward Clifford, Supervisor of the Department of Labor and Industries of the State of Washington and another were defendants, and a judgment of the Circuit Court of Appeals made and entered on March 14th, 1923, and a certain mandate of the last named Court entered thereafter by this Court in the office of the [12] Clerk thereof; that a copy of the said voucher is attached to the affidavit and complaint filed by the plaintiff herein; that said voucher was filed with the said respondent on or about the date of its issuance by direction of the Department of Labor and Industries of the State of Washington; that on the 26th day of May, 1923, the plaintiff and relator presented a copy of said voucher to the respondent who already had in his possession the original voucher at the office of the State Auditor of the State of

Washington, and a request made that the respondent audit the same as a claim against the said "Accident Fund" and issue to him, the said Thomas W. Miller, Alien Property Custodian of the United States of America, a warrant upon the said "Accident Fund" in the sum of \$24,348 and in accord with the terms of said voucher, which said requests were then and there refused; that said refusals were without warrant of law, arbitrary and in a matter in which defendant had no discretion; that the plaintiff has no plain, speedy or adequate remedy in the ordinary course of law.

THEREFORE we do command you that you answer the petition and affidavit filed in behalf of the relator, a copy of which shall be served upon you, together with this writ; that immediately after the receipt of this writ you audit the said voucher and issue to Thomas W. Miller, Alien Property Custodian of the United States of America, a warrant upon the "Accident Fund" of the State of Washington for the sum of \$24,348, as provided by the said voucher, or that you show cause before this Court at the courtroom thereof in the courthouse of the United States District Court for the Western District of Washington, Southern Division, in the City of Tacoma, County of Pierce, on the 25th day of June, 1923, at the opening of the Court on that day, why you have not done so. [13]

WITNESS the Honorable EDWARD E. CUSHMAN, Judge of the United States District Court for the Western District of Washington, Southern

Division, and the seal of said Court, this 8th day of June, 1923.

[Seal]

F. M. HARSHBERGER,

Clerk.

By Alice Huggins,

Deputy Clerk.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jun. 8, 1923. F. M. Harshberger, Clerk, By Ed. M. Lakin, Deputy. [14]

[Title of Court and Cause.]

No. 4116.

Demurrer.

Comes now the defendant and respondent, by and through his attorneys, Honorable John H. Dunbar and M. H. Wight, attorney general and assistant attorney general, respectively, of the State of Washington, and demurs to the petition and affidavit of the plaintiff and relator herein upon the grounds and for the reasons that, as appears upon the face of said petition and affidavit:

I.

That the above-named Court has no jurisdiction of the defendant and respondent, or of the subject matter of this action.

II.

That the petition and affidavit of the plaintiff and relator on file herein does not state facts sufficient to constitute a cause of action.

WHEREFORE, defendant and respondent prays
for the order of this Court sustaining this demurrer.
GUIE & HALVERSTADT,
Of Counsel.

JOHN H. DUNBAR,
Attorney General,
M. H. WIGHT,
Assistant Attorney General,
Attorneys for Defendant and Respondent

[Endorsed]: Filed in the United States District
Court, Western District of Washington, Southern
Division. Jun. 25, 1923. F. M. Harshberger,
Clerk. By Ed. M. Lakin, Deputy. [15]

[Title of Court and Cause.]

No. 4116.

Memorandum Decision on Demurrer.

Filed July 14, 1923.

H. G. & DIX H. ROWLAND, for Relator.
Hon. JOHN H. DUNBAR, Attorney General,
Hon. M. H. WIGHT, Ass't. Attorney General,
GUIE & HALVERSTADT, for Respondents.

CUSHMAN, D. J.—Relator cites and relies upon
the following cases:

Commercial Trust Co. of New Jersey vs.
Thomas W. Miller, Alien Property Cus-
todian, Adv. Op. U. S. Sup. Ct. No. 14, pp.
531 to 564; May 15, 1923; [16]

- Charles Ahrenfeldt vs. Thomas W. Miller,
Alien Property Custodian, Adv. Op. U. S.
Sup. Ct. No 14, p. 546, May 15, 1923;
Kahn vs. Anderson, 255 U. S. 1, 65 Law Ed.
469, 41 Sup. Ct. R. 224;
Vincenti vs. U. S. 272 Fed. 114, 256 U. S. 700,
65 L. Ed. 1178, 41 Sup. Ct. Rep. 538;
Kohn vs Kohn, 264 Fed. 253;
Miller vs. U. S., 78 U. S. 268;
Miller vs. Camp, 280 Fed. 520;
In re Miller, 281 Fed. 773;
Garvan vs. Marconi Wireless Tel. Co., 275 Fed.
486;
Garvan vs. \$20,000 Bonds, 265 Fed. 477;
Wenatchee Produce Company vs. Great North-
ern Railway, 271 Fed. 784;
Central Union Trust Co. vs. Garvan, 254 U. S.
550;
Stoehr vs. Wallace, 255 U. S. 239;
Simon vs. Am. Exchange Bank, Decided De-
cember, 1922;
Poindexter vs. Greenhow, 114 U. S. 270, 29 Law
Ed. 191;
Board of Liquidation et al. vs. Henry S. Mc-
Comb, 92 U. S. 531; 35 L. E. 623;
State vs. Toole, 26 Mont. 22; 66 Pac. 496; 91
Am. St. Reports, 386;
Chaffin vs. Taylor, 116 U. S., 571; 29 Law Ed.,
728;
State ex rel. Gillette vs. C. W. Clausen, 44
Wash. 437;
Abernathy vs. Medical Lake, 9 Wash. 112;

- Union Sav. B. & T. Co. vs. Gelbach, 8 Wash. 497;
Cloud vs. Sumas, 9 Wash. 399;
La France Fire Engine Co. vs. Davis, 9 Wash. 600; [17]
Mason vs. Purdy, 11 Wash. 591;
Smith vs. Ormsby, 20 Wash. 396;
State ex rel. Porter vs. Headlee, 18 Wash. 220;
State ex rel. Dahlquist vs. Van Wick, 20 Wash. 391;
American Bridge Company vs. Wheeler, 35 Wash. 40;
State ex rel. Maddaugh vs. Ritter, 74 Wash. 649;
A. I. Beach vs. Andrew Olson et al., 91 Wash. 56;
Savage vs. Sternberg, 67 Am. St. Rpts. 751;
Brownell vs. Town of Greenwich, 22 N. E. 24-27, 114 N. Y. 518; 4 L. R. A. 684;
State vs. Pierce, 52 Kan. 521; 35 Pac. 19-22;
Corning vs. Meade County Commissioners, 102 Fed. 57;
State vs. Akers, 92 Kan. 169; 140 Pac. 637;
Jerome vs. Rio Grande County Commissioners, 18 Fed. 873;
Bank of Calif. vs. Shaber, 55 Cal. 322;
State vs. Gandy, 12 Neb. 232;
Busch vs. Geisy, 16 Ore. 355;
Day vs. Callow, 39 Cal. 593;
Lankford vs. Platte Iron Works, 235 U. S. 461;
Rolston vs. Missouri Fund Commissioners, 120 U. S. 390;

- Ruling Case Law, Sec. 148, Vol. 18;
Ray vs. Wilson, 29 Florida, 342; 42 L. R. A.
775;
Masses Publishing Co. vs. Patten, 246 Fed. 24;
U. S. vs. Casey, 247 Fed. 362; [18]
Story vs. Perkins, 243 Fed. 997;
McCormick vs. Humphrey, 27 Ind. 144;
Merchants, etc. Bank vs. Union Bank, 25 La.
387;
U. S. vs. Casey, 247 Fed. 362;
Tarble's Case, 13 Wall. 397, 20 U. S.;
Same 80 U. S. 397-413;
Miller, Executor vs. U. S. 78 U. S. 268-331;
Jefferson Publishing Co. vs West, 245 Fed. 585;
U. S. vs. Pierce, 245 Fed. 878;
U. S. vs. Sugar, 243 Fed. 423;
Storey vs. Perkins, 243 Fed. 997;
U. S. vs. Sugarman, 245 Fed. 604;
U. S. vs. Stephens, 245 Fed. 956;
Angelus vs. Sullivan, 246 Fed. 54;
State vs. Hohm (Minn.), 166 N. W. 181;
Cohens vs. Virginia, 6 Wheat. 264;
Railroad Company vs. Miss., 102 U. S. 135;
Ames vs. Kansas, 111 U. S. 449;
Virginia Coupon Cases, 114 U. S. 270;
Smith vs. Kansas City Title & Trust Co., 255
U. S. 199; 65 Law Ed. 585;
Texas vs. Lewis, 14 Fed. 65;
U. S. vs. Louisiana, 123 U. S. 33; 127 U. S. 67;
Jones vs. Reed, 3 Wash. 60;
Johnson vs. Lankford, 245 U. S. 544;

Hopkins vs. Clemson Agricultural College, 221
U. S. 635;

Davenport vs. U. S. 19 Law Ed. 704;

Holt Co. vs. National Life Ins. Co., 25 C. C. A.
475;

Graham vs. Folsom, 200 U. S. 248; [19]

Gunter vs Atl. Coast Line R. Co.,
200 U. S. 273, 4; 50 Law Ed. 478;

Morrill vs. Am. Reserve Bond Co.,
151 Fed. 305;

Nashville vs. Cooper, 6 Wall. 247;
(73 U. S.) 18 Law Ed. 851;

Respondents cite and reply upon:

Board of Liquidation vs. McComb,
92 U. S. 531 at 541;

Antoni vs. Greenhow, 107 U. S. 769, at 783;

In re Ayers, 123 U. S. 443;

Pennoyer vs. McConnaughy, 140 U. S. 1, at 9,
10; 11 & 12;

Fitts vs. McGhee, 172 U. S. 516 at 524,
525; 528 & 529;

Lankford vs. Platte Iron Works, 235 U. S. 461;

Louisiana vs. Jumel, 107 U. S. 711 at 718,
720; 721 & 722;

Smith vs. Reeves, 178 U. S. 436 at 438;

Johnson vs. Lankford, 245 U. S. 541 at 545;

Edward Clifford, Superintendent, etc., vs.
Thomas W. Miller, 288 Fed. 537;

Miller, Alien Property Custodian vs. Rouse,
276 Fed. 715 at 716;

In these two cases, the Alien Property Custodian sues. In the one case, the Court is asked to

direct the Treasurer of the State of Washington to pay the relator the amount due on certain warrants in his possession, drawn upon the Accident Fund, which fund is held by the State Treasurer under the Workmen's Compensation Act of the State. The warrants and claims represented are alleged to be due former alien enemies or the allies of alien enemies of the United States. In the other case, the Court is asked to direct the State Auditor to audit a certain voucher upon such fund covering like claims, issued relator by [20] the Department of Labor and Industries of the State of Washington and to issue relator a warrant upon the State Treasurer for payment thereof.

Respondents demur generally and upon the ground that the Court has no jurisdiction.

While these cases grow out of matters involved in Edward Clifford, Superintendent, etc., vs. Miller, Custodian (288 Fed. 537), they are not ancillary to that cause.

Section 24 of the Workmen's Compensation Act (Sec. 7703 Remington's Comp. Stats. 1922) in part provides:

"The director of labor and industries shall, in accordance with the provisions of this Act:

"(2) Ascertain and establish the amounts to be paid into and out of the accident fund.

"(3) Regulate the proof of accident and extent thereof, the proof of death and the proof of relationship and the extent of dependency.

"(5) Issue proper receipts for moneys re-

ceived, and certificates for benefits accrued and accruing.”

Section 26 of the Act (Sec. 7705 Rem. Comp. Stats.) provides:

“Disbursements out of the funds shall be made only upon warrants drawn by the State Auditor upon vouchers therefor transmitted to him by the Department and audited by him. The State Treasurer shall pay every warrant out of the fund upon which it is drawn.
* * *

The statute defining generally the duties of the State Auditor provides, among others:

“It shall be the duty of the Auditor;

1. To audit, adjust and settle all claims against the State, payable out of the treasury, except only such claims as may be expressly required by law to be audited and settled by other officers or persons. * * *

16. In his discretion, to require any person presenting an account for settlement to be sworn before him, and to answer, orally or in writing, as to any facts relating to it.
* * * ” (Sec. 9007 Rem. & Bal. Code).

By Section 9013 Rem. & Bal. Code, it is provided: [21]

“All persons having claims against the State shall exhibit the same, with the evidence in support thereof, to the Auditor to be audited, settled, and allowed within two years after such claim shall have accrued, and not afterwards.”

While Section 9019 (Rem. & Bal. Code) provides:

“The Auditor, whenever he may think it necessary in the settlement of any account or the drawing of any warrant, may examine the party, witnesses and others on oath or affirmation touching any matter material to be known in the settlement of the account or the drawing of the warrant, and for that purpose he may issue summons and compel witnesses to attend before him and give testimony in the same manner and by the same means allowed in courts of record, and he shall reduce such evidence to writing and file the same in his office.”

On the part of the relator it is contended that under Section 7705, Remington's Compiled Stats., *supra*, the duties of the Auditor concerning the issuing of a warrant are purely ministerial; that all discretion in the matter is exhausted when the Director has, under Section 7703, Remington's Comp. Stats., ascertained and established the amounts to be paid and issued a certificate for benefits accrued.

The Court is constrained to give effect to each word of the statute, unless to do so would clearly tend to defeat or impair the legislative intent. The Court cannot say, in view of the language of Section 7705, but that it was intended the Auditor should exercise a supervisory power and discretion concerning the acts of the Director, or it may have been intended that he, in his discretion, should consider matters supplemental to the Auditor's de-

termination, as in case of death of a beneficiary after certificate or voucher issued. In either event, he is vested with a discretion in the matter.

It has been contended that these cases arising under the Constitution and Laws of the United States, the jurisdiction of this Court is original and that of the Supreme Court appellate. If that were all that was to be taken into account, the position [22] would be unassailable, but the controlling questions are whether, the Court being asked to control the discretion of these State officers, the suits are not, in effect, suits against the State, and whether, the Court being asked to control the discretion of these State officers, the suits are not, in effect, suits against the State, and whether the provisions of the Trading with the Enemy Act show an intention to confer on this Court power so to do.

The State Auditor and State Treasurer are, by the State Constitution, made executive officers of the State of Washington. (Art. 3, Sec. 1.) The acts, the performance of which the Court is asked to compel them to do, are not at all in their own, individual interest, but solely for the State. The suits are, therefore, to be considered as against the State.

Lankford vs. Platte Iron Works,

235 U. S. 461;

Louisiana vs. Jumel, 107 U. S. 711;

Smith vs. Reeves, 178 U. S. 436.

While the question is one of jurisdiction of the Court, the following considerations are not deemed out of place:

Under the State Constitution and Law, it may be that the proper State court, by mandamus, could decree payment of the warrants by the Auditor. (State ex rel. Gillette vs. Claussen, 44 Wash. 437); but the question before this Court is not solved by that concession.

Relator in the suit against the Auditor relies upon the case of State ex rel. Gillette vs. Claussen, *supra*; but in that case it is said:

“Under the old practice in mandamus the question whether an auditing officer against whom a writ of mandamus was sought acted in a purely ministerial capacity, or whether he exercised judgment and discretion in the settlement and adjustment of claims presented to him, was one of controlling importance, as the writ would lie in the former case but not in the latter. Under the practice in this State, however, the question whether the officer acts in a purely ministerial capacity or whether he exercises judgment and discretion, seems [23] to be one of little moment, except in so far as it may serve as a guide for the officer himself in the discharge of his official duties.

“This Court has repeatedly held that a mandamus proceeding under our statute possesses all of the elements of a civil action, and that it is no defense to the writ to show that the officer

to whom the writ is directed exercised judgment and discretion and acted in good faith in the disallowance of the claim upon which the application for the writ is based. If any part of the relief to which the petitioner is entitled is by writ of mandamus the Court will try out all incidental questions in the mandamus proceeding.” (At pp. 442 & 443.)

The authority of the District Court of the United States, at least where the jurisdiction rests, not upon diversity of citizenship, but, in a case such as the present one, upon the fact that the controversy arises under the Constitution and Laws of the United States, does not extend as far as that of the State Court under its law as construed in the foregoing opinion. By Section 262 of the Judicial Code (Sec. 1239 Comp. Stats.) the Court is authorized to

“issue all writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law:”

In mandamus proceedings the Conformity Statute does not apply,—at least as to the scope of the remedy.

Rosenbaum vs. Bauer,

120 U. S. 450;

Board of Liquidation vs. U. S.,

108 Fed. 689;

47 C. C. A. 587;

Cares vs. N. W. Nat. Bldg., L. I. Ass’n,

55 Fed. 209.

Under its general jurisdiction, this Court may not, by mandamus, control such state officer in the exercise of his discretion; nor take money from the Treasury of the State.

Clifford vs. Miller, 288 Fed. 537.

The remaining question is not whether the Custodian has the [24] right to the possession of the money seized, but withheld by the Treasurer in the one case, or whether he has the right to the warrants which the Auditor refuses to issue in the other. The question now for determination is whether, by the Trading with the Enemy Act, this Court has been given special jurisdiction and authority to determine what right and decree delivery to the Custodian of the money and the issuance and delivery to him of the warrants.

By Section 6 of The Trading with the Enemy Act (Sec. 3115 $\frac{1}{2}$ cc Comp. Stats.) it is provided:

“The president is authorized to appoint, prescribe the duties of, and fix the salary (not to exceed \$5,000 per annum) of an official to be known as the Alien Property Custodian, who shall be empowered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned, or delivered to said Custodian under the provisions of this Act; and to hold, administer and account for the same under the general direction of the President and as provided in this Act.”

Section 7 (Section 3115 $\frac{1}{2}$ d Comp. Stats.) in part provides: “(c) If the President shall

so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * *

“The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him, shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Cus-

todian or by the Treasurer of the United States. [25]

* * * * *

“(e) No *person* shall be held liable in any Court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act.”

Section 3115½ i provides:

“The district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled, ‘An Act to codify, revise and amend the laws relating to the Judiciary’.”

Section 3115½aa provides:

“The word ‘*PERSON*,’ as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or *BODY POLITIC*.” (Italics those of the Court.)

Unless the words “body politic” occurring in the last quoted section were meant to include a State of the Union, as well as a municipality, there would, without question, be no authority for these

proceedings. It has been held that the words "body politic" used in certain statutes include a State. (*Ervin vs. State*, 48 N. E. 249 at 251; 115 Ind. 332.) In holding that the United States could make a contract not previously directed by statute, Marshall, as Circuit Justice, held (*Fed. Case No. 15, 747*):

"The United States is a government and consequently a body politic and corporate capable of obtaining the objects for which it was created by the means which are necessary for the attainment."

It is well understood that this is a possessory suit, a seizure or capture on land, and that, as provided in the Act, the rights of all interested are to be determined after the surrender of possession.

Under its war powers, Congress doubtless could confer upon a District Judge authority to coerce a sovereign State and its officers, but that it so intended is not lightly to be concluded [26] in the absence of positive and express congressional enactment,—particularly so in view of the provisions of Section 233 of the Judicial Code (Section 1210 *Comp. Stats.*), which provides:

"The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive jurisdiction."

This statute is controlling of this question, despite the fact that the present suit may not be purely a controversy of a civil nature. The dignified treatment and consideration due a sovereign State form no small part of the reason that has actuated the law making powers in making a State subject alone to the jurisdiction of the Supreme Court. An implied repeal of the law conferring, so far as the Courts of the United States are concerned, exclusive jurisdiction on the Supreme Court of suits against a State is not to be sanctioned, in view of the long established recognition of this principle in the history of the doctrine of State's rights.

The demurrers are sustained for want of jurisdiction.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. July 14, 1923. F. M. Harshberger, Clerk. By Ed. M. Lakin, Deputy. [27]

[Title of Court and Cause.]

No. 4116.

Judgment of Dismissal.

This cause coming on for hearing on the 25th day of June, 1923, upon the return of the alternative writ of mandamus issued herein, the plaintiff and relator appearing by Wallace W. Mount, assistant United States district attorney, and by H. G. Rowland, attorney for and representative of the relator, and Dix H. Rowland of counsel for the defendant

and relator appearing by John H. Dunbar, attorney general for the State of Washington, and M. H. Wight, assistant attorney general for the State of Washington, and Guie and Halverstadt, counsel, and the said defendants and relators having been duly and regularly served with the affidavit and petition in said action and the alternative writ of mandamus as by order of Court provided and having appeared and filed a special appearance and also a demurrer to the affidavit and petition of the plaintiff and relator alleging as one of the grounds of the said demurrer that it appeared upon the face of the said petition and affidavit that the above-named court has no jurisdiction of the defendant and respondent or of the subject matter of the action and also that the petition and affidavit did not state facts sufficient to constitute a cause of action and the court having heard the arguments of counsel for the relator and respondent and having taken the matter under advisement and having heretofore entered a memorandum decision sustaining the [28] said demurrer of the defendant and respondent for the reason that it appeared on the face of the affidavit and petition of plaintiff and relator that this Court has no jurisdiction to hear and determine said cause and the plaintiff and relator having elected to stand upon his said affidavit and petition for a writ of mandamus and not to plead further

IT IS THEREFORE ORDERED that the said demurrer be and the same is sustained for want of jurisdiction and the said action be and the same is

hereby dismissed for want of jurisdiction in the Court to hear and determine the same to all of which the plaintiff and relator excepts and his exception is duly allowed. Dated this 17th day of July, 1923.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. July 17, 1923. F. M. Harshberger, Clerk. By Ed. M. Lakin, Deputy. [29]

[Title of Court and Cause.]

No. 4116.

Petition for Writ of Error.

To the Hon. Edward E. Cushman, Judge of the District Court aforesaid:

Now comes the United States of America on the relation of Thomas W. Miller, Alien Property Custodian of the United States of America, by Wallace W. Mount, Assistant United States District Attorney, attorney for the relator, and Harry G. Rowland, attorney for and representative of the relator, and respectfully shows that on the 17th day of July, 1923, the Court entered final judgment of dismissal herein for lack of jurisdiction against petitioner and in favor of C. W. Clausen, State Auditor of the State of Washington.

Your petitioner feeling himself aggrieved by said judgment entered therein as aforesaid herewith

petitions the Court for an order allowing him to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit under the laws of the United States in such cases made and provided.

Wherefore, premises considered, your petitioner prays that a writ of error do issue that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid sitting at San Francisco, [30] California, in said circuit for the correction of the errors complained of and herewith assigned, be allowed and that all further proceedings may be suspended until the determination of the said writ of error by the Circuit Court of Appeals of the United States.

W. W. MOUNT,

Assistant United States District Attorney, and

HARRY G. ROWLAND,

Attorneys for Petitioners in Error.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Aug. 18, 1923. F. M. Harshberger, Clerk. By Ed. M. Lakin, Deputy. [31]

[Title of Court and Cause.]

No. 4115.

Assignments of Error.

To the Hon. Edward E. Cushman, Judge of the District Court aforesaid:

Now comes the United States of America on the

relation of Thomas W. Miller, Alien Property Custodian of the United States of America, plaintiff and relator, by Wallace W. Mount, Assistant United States District Attorney, attorney for relator, and Harry G. Rowland, attorney for and representative of the relator, in the above numbered and entitled cause and in connection with its petition for a writ of error in this cause assigns the following errors which plaintiff in error avers occurred on the hearing thereof, and upon which it relies to reverse the judgment entered herein, as appears of record:

FIRST.

That the United States District Court for the Western District of Washington, Southern Division, erred in holding that the District Court did not have jurisdiction of the defendant and respondent and of the subject matter of the action and for that reason erred in sustaining the demurrer of the defendant and respondent to the petition and affidavit of plaintiff and relator filed in this cause.

SECOND.

That the said District Court erred in entering a judgment [32] of dismissal in favor of defendant and respondent and against plaintiff and relator for lack of jurisdiction.

THIRD.

The said District Court erred in not granting plaintiff and relator a peremptory writ of mandamus against the defendant and respondent upon the return of the alternative writ issued herein.

WHEREFORE, plaintiff in error prays that judgment of said Court be reversed and that the said District Court be instructed to proceed with the hearing of said action and issue a peremptory writ of mandamus directed to the defendant and respondent as prayed for in plaintiff's affidavit and petition.

W. W. MOUNT,
Assistant United States District Attorney, and
HARRY G. ROWLAND,
Attorneys for Plaintiff and Relator in Error.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Aug. 18, 1923. F. M. Harshberger, Clerk. By Ed. M. Lakin, Deputy. [33]

In the District Court of the United States for the
Western District of Washington, Southern
Division

No. 4116.

THE UNITED STATES OF AMERICA, on the
Relation of THOMAS W. MILLER, Alien
Property Custodian of the United States of
America,

Plaintiff and Relator,
vs.

C. W. CLAUSEN, State Auditor of the State of
Washington,
Defendant and Respondent.

Order Granting Writ of Error.

Now, on this 20th day of August, 1923, it is ordered that a writ of error be granted the plaintiff and relator in the above-entitled action in accord with the prayer of his petition filed herein.

FRANK S. DIETRICH,
District Judge of the United States for the Western
District of Washington, Southern Division.

Copy of order granting writ of error acknowledged this 20th day of August, 1923.

JOHN H. DUNBAR,
Attorney General,
M. H. WIGHT,
Assistant Attorney General,
Attorneys for Defendant and Respondent.
GUIE & HALVERSTADT,
Counsel for Defendant and Respondent.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Aug. 20, 1923. F. M. Harshberger, Clerk. By Ed. M. Lakin, Deputy. [34]

In the District Court of the United States for the
Western District of Washington, Southern
Division.

No. 4116—"Lodged."

THE UNITED STATES OF AMERICA, on the
Relation of THOMAS W. MILLER, Alien
Property Custodian of the United States of
America,

Plaintiff and Relator,

vs.

C. W. CLAUSEN, State Auditor of the State of
Washington,

Defendant and Respondent.

Writ of Error.

United States of America,

Western District of Washington,—ss.

The President of the United States of America to
the Honorable E. E. Cushman, Judge of the
District Court of the United States for the
Western District of Washington, Southern
Division, GREETING:

Because in the records and proceedings, as also
in the rendition of the judgment of a plea which is
in the District Court before you, between the United
States of America on the relation of Thomas W.
Miller, Alien Property Custodian of the United
States of America, plaintiff and relator in error,
and C. W. Clausen, State Auditor of the State of
Washington, defendant and respondent in error, a

manifest error has happened to the damage of the United States of America on the relation of Thomas W. Miller, Alien Property Custodian of the United States of America, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that under your seal you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so [35] that you have the same at San Francisco, in the State of California, where said Court is sitting, within thirty days of the date hereof, in the said Circuit Court of Appeals, to be then and there held, and the records and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right according to the laws and customs of the United States should be done.

WITNESS The Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this the 20th day of August, A D. 1923.

F. M. HARSHBERGER,

Clerk.

By Ed. M. Lakin,

Deputy Clerk.

Clerk of the United States District Court, for the
Western District of Washington, Southern
Division.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Aug. 20, 1923. F. M. Harshberger, Clerk. By Ed. M. Lakin, Deputy. [36]

In the District Court of the United States for the
Western District of Washington, Southern
Division.

? No. 4116—"LODGED."

THE UNITED STATES OF AMERICA, On the
Relation of THOMAS W. MILLER, Alien
Property Custodian of the United States
of America,

Plaintiff and Relator,

vs.

C. W. CLAUSEN, State Auditor of the State of
Washington,

Defendant and Respondent.

Citation to Defendant in Error.

The United States of America to C. W. Clausen,
State Auditor of the State of Washington,
GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, California, in said Circuit, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Wash-

ington, Southern Division, wherein the United States on the relation of Thomas W. Miller, Alien Property Custodian of the United States of America is plaintiff and relator in error, and you are the defendant and respondent in error, to show cause, if any there be, why the judgment rendered against the said plaintiff and relator in error as in the writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable FRANK S. DIETRICH, Judge of the United States District Court, at Tacoma, within said District, this 20th day [37] day of August, in the year of our Lord one thousand nine hundred and twenty-three.

FRANK S. DIETRICH,

Judge of the District Court of the United States
for the Western District of Washington,
Southern Division.

Attest: [Seal U. S. Dist. Court.] F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy Clerk of the United States District Court for the Western District of Washington, Southern Division.

Receipt of a copy and service of the foregoing citation this 20th day of August, 1923, is hereby admitted.

JOHN H. DUNBAR,

Attorney General,

M. H. WIGHT,

Assistant Attorney General,

GUIE & HALVERSTADT,

Attorneys for the Defendant and Respondent.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Aug. 20, 1923. F. M. Harshberger, Clerk. By Ed. M. Lakin, Deputy. [38]

No. 4116.

[Title of Court and Cause.]

Stipulation Re Printing Record.

It is hereby stipulated between the plaintiff and relator and the defendant and respondent, through their respective attorneys, that the following designated papers comprise all the papers, exhibits and proceedings which are necessary to the hearing of the cause upon writ of error to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Petition and affidavit for writ of mandamus.
2. Order for alternative writ of mandamus.
3. Alternative writ of mandamus.
4. Demurrer of defendant and respondent to affidavit and petition of plaintiff and relator.
5. Opinion of the District Court sustaining the defendant's and respondent's demurrer to plaintiff's affidavit and petition herein.
6. Decree and judgment of dismissal.
7. Petition for writ of error.
8. Plaintiff's and relator's assignment of errors.
9. Order granting writ of error.
10. Writ of error.
11. Citation to defendant in error.

12. Stipulation omitting titles and captions and omitting from the record copy of Exhibit "A." [39]
13. This praecipe.
14. Clerk's certificate.

It is further stipulated that in preparing the printed record all captions and titles, except upon writ of error, citation to defendant in error, and order allowing writ of error, may be omitted and that Plaintiff's Exhibit "A" attached to his petition and affidavit need not be printed in the record.

W. W. MOUNT,

Assistant United States District Attorney,

HARRY G. ROWLAND,

Attorney for and Representative of Relator, Attorneys for Plaintiff and Relator.

JOHN H. DUNBAR,

Attorney General,

M. H. WRIGHT,

Assistant Attorney General,

GUIE & HALVERSTADT,

Attorneys for Defendant and Respondent.

[Endorsed]: Filed in the United States District Court Western District of Washington, Southern Division. Aug. 20, 1923. F. M. Harshberger, Clerk. By Ed. M. Lakin, Deputy. [40]

No. 4116.

[Title of Court and Cause.]

Praeceptum for Transcript of Record.

United States of America,

Western District of Washington,—ss.

To the Clerk of the Above-entitled Court, GREET-
ING:

Please make duly authenticate, and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, a transcript of the record on appeal in the above-entitled cause to include the following:

First.

Petition and affidavit for writ of mandamus.

Second.

Order for alternative writ of mandamus.

Third.

Alternative writ of mandamus.

Fourth.

Demurrer of Defendant and respondent to affidavit and petition of plaintiff and relator.

Fifth.

The opinion of the District Court sustaining defendant's and respondent's demurrer to plaintiff's petition and affidavit herein.

Sixth.

Decree and judgment of dismissal.

Seventh.

Petition for writ of error.

Eighth.

Plaintiff's and relator's assignments
of error.

Ninth.

Order granting writ of error.

Tenth.

Writ of error.

Eleventh.

Citation to defendant in error.

Twelfth.

Stipulation omitting titles and cap-
tions, and omitting from the record
copy of Exhibit "A." [41]

Thirteenth.

This praecipe.

Fourteenth.

Clerk's certificate.

W. W. MOUNT,

Assistant United States District Attorney and

HARRY G. ROWLAND,

Representative of Alien Property Custodian, At-
torneys for Plaintiff and Relator.

[Endorsed]: Filed in the United States District
Court Western District of Washington, Southern
Division. Aug. 20, 1923. F. M. Harshberger,
Clerk. By Ed. M. Lakin, Deputy. [42]

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing is a true and correct copy of the record and proceedings in the case of the United States of America on the relation of Thomas W. Miller, Alien Property Custodian of the United States of America, Plaintiff and relator, versus C. W. Clausen, State Auditor of the State of Washington, defendant and respondent, Cause No. 4116, as required by the praecipe of counsel filed and shown herein, as the originals thereto appear on file and of record in my office in said District of Tacoma.

I further certify and return that I hereto attach and transmit the original writ of error and the original Citation to Defendant in Error.

Attest my hand and the seal of said District Court, at Tacoma, in said District, this 22d day of August, A. D. 1923.

[Seal]

F. M. HARSHBERGER,

Clerk.

By Ed. M. Lakin,
Deputy Clerk. [43]

In the District Court of the United States for the
Western District of Washington, Southern
Division.

No. 4116.

THE UNITED STATES OF AMERICA, on the
Relation of THOMAS W. MILLER, Alien
Property Custodian of the United States of
America,

Plaintiff and Relator,

vs.

C. W. CLAUSEN, State Auditor of the State of
Washington,

Defendant and Respondent.

Writ of Error.

United States of America,
Western District of Washington,—ss.

The President of the United States of America to
the Honorable E. E. Cushman, Judge of the
District Court of the United States for the
Western District of Washington, Southern
Division, GREETING:

Because in the records and proceedings, as also
in the rendition of the judgment of a plea which is
in the District Court before you, between the United
States of America on the relation of Thomas W.
Miller, Alien Property Custodian of the United
States of America, plaintiff and relator in error,
and C. W. Clausen, State Auditor of the State of
Washington, defendant and respondent in error,

a manifest error has happened to the damage of the United States of America on the relation of Thomas W. Miller, Alien Property Custodian of the United States of America, plaintiff in error, as by said complaint, appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that under your seal you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the State of California, where said Court is sitting, within thirty days of the date hereof, in the said Circuit Court of Appeals, to be then and there held, and the records and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right according to the laws and customs of the United States should be done.

WITNESS The Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this the 20th day of August, A. D. 1923.

[Seal]

F. M. HARSHBERGER,

Clerk.

By Ed. M. Lakin,

Deputy.

Clerk of the United States District Court for the
Western District of Washington, Southern
Division.

Filed in the United States District Court, Western District of Washington, Southern Division. Aug. 20, 1923. F. M. Harshberger, Clerk. By Ed. M. Lakin, Deputy.

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 4116.

THE UNITED STATES OF AMERICA, on the Relation of THOMAS W. MILLER, Alien Property Custodian of the United States of America,

Plaintiff and Relator,

vs.

C. W. CLAUSEN, State Auditor of the State of Washington,

Defendant and Respondent.

Citation to Defendant in Error.

The United States of America to C. W. Clausen, State Auditor of the State of Washington,
GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, California, in said Circuit, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Western District of Washington, Southern Di-

vision, wherein The United States on the relation of Thomas W. Miller, Alien Property Custodian of the United States of America, is plaintiff and relator in error, and you are the defendant and respondent in error, to show cause, if any there be, why the judgment rendered against the said plaintiff and relator in error as in the Writ of Error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Hon. FRANK S. DIETRICH, Judge of the United States District Court, at Tacoma, within said District, this 20th day of August, in the year of our Lord one thousand nine hundred and twenty-three.

FRANK. S. DIETRICH,
Judge of the District Court of the United States
for the Western District of Washington, Southern Division.

Attest:

[Seal]

F. M. HARSHBERGER,

Clerk.

By Ed. M. Lakin,
Deputy Clerk of the United States District Court
for the Western District of Washington, Southern Division.

Receipt of a copy and service of the foregoing Citation this 20th day of August, 1923, is hereby admitted.

JOHN H. DUNBAR,

Attorney General,

M. H. WIGHT,

Assistant Attorney General,

GUIE & HALVERSTADT,

Attorneys for the Defendant and Respondent.

Filed in the United States District Court, Western District of Washington, Southern Division. Aug. 20, 1923. F. M. Harshberger, Clerk. By Ed. M. Lakin, Deputy.

[Endorsed]: No. 4083. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America on the Relation of Thomas W. Miller, Alien Property Custodian of the United States of America, Plaintiff in Error, vs. C. W. Clausen, as State Auditor of the State of Washington, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

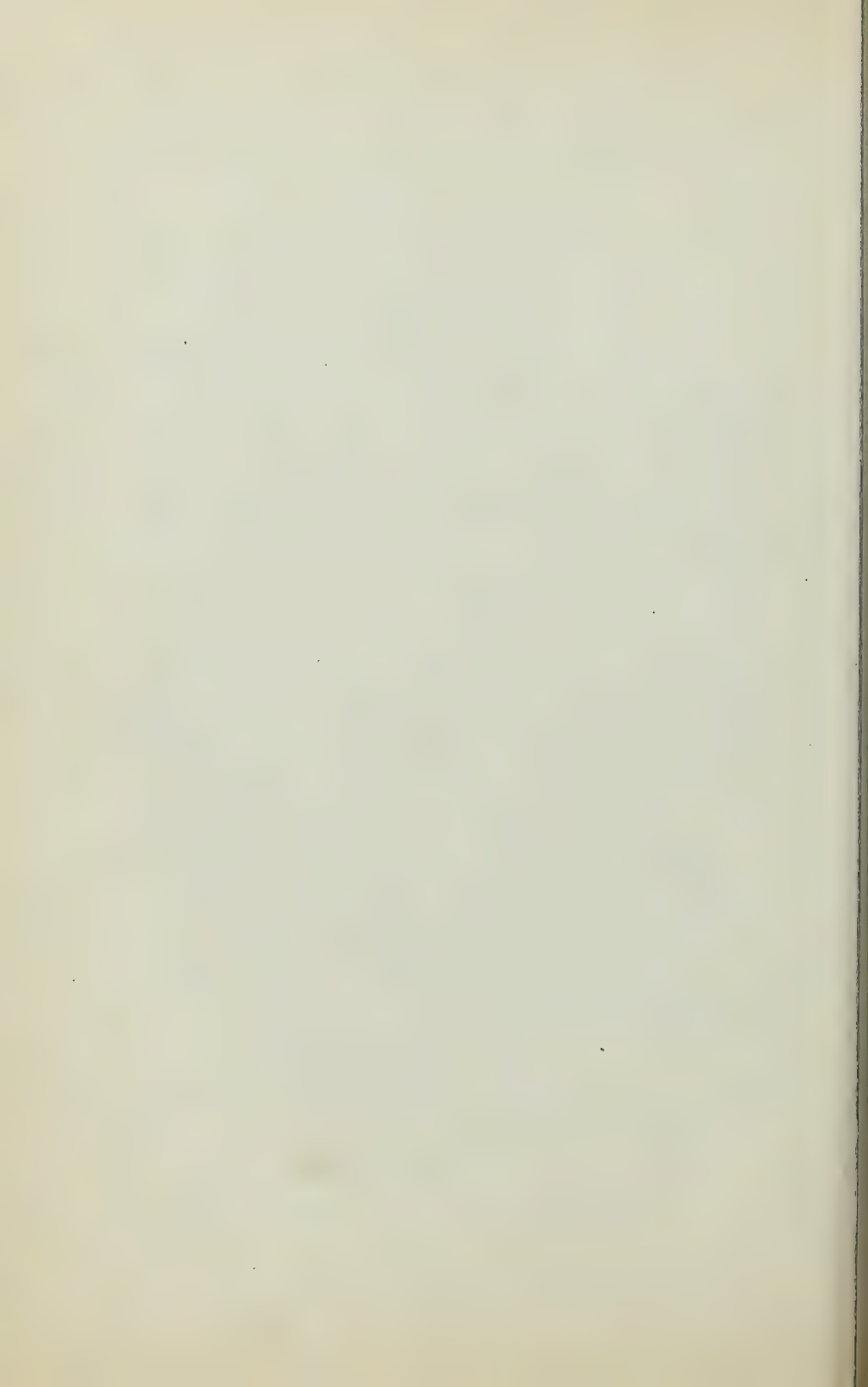
Filed August 23, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.



In the United States Circuit Court of Appeals ²

For the Ninth Circuit

THE UNITED STATES OF AMERICA, ex. rel., Thomas
W. Miller, Alien Property Custodian of the
United States of America,
Plaintiff and Relator in Error.

—VS.—

C. W. CLAUSEN, State Auditor of the State of
Washington,
Defendant and Respondent in Error.

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT OF THE WESTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION.

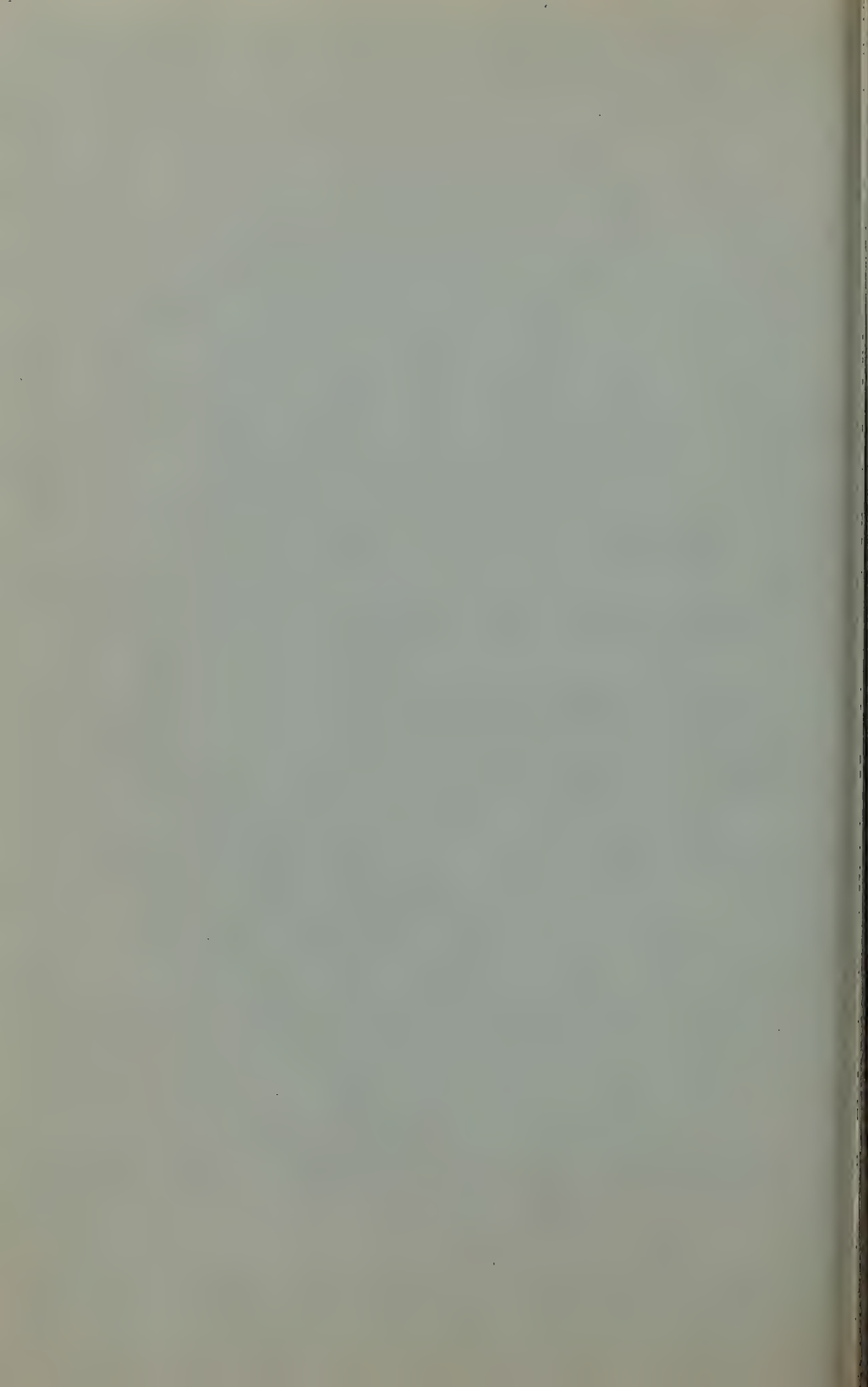
HON. EDWARD E. CUSHMAN, *Judge Presiding.*

BRIEF FOR PLAINTIFF AND RELATOR
IN ERROR

THOMAS P. REVELLE,
United States District Attorney,
W. W. MOUNT,
Assistant United States District Attorney,
Attorneys for Plaintiff and Relator in Error.

HARRY G. ROWLAND,
Representative of Alien Property Custodian,
DIX H. ROWLAND,
Counsel for Plaintiff and Relator in Error.

310 Federal Building, Seattle, Washington.



In the United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA, ex. rel., Thomas
W. Miller, Alien Property Custodian of the
United States of America,

Plaintiff and Relator in Error.

—vs.—

C. W. CLAUSEN, State Auditor of the State of
Washington,

Defendant and Respondent in Error.

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT OF THE WESTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *Judge Presiding.*

BRIEF FOR PLAINTIFF AND RELATOR
IN ERROR

STATEMENT OF THE CASE

In the year 1922, THOMAS W. MILLER, Alien Property Custodian of the United States of America, who is the plaintiff and relator in this action, filed a suit in equity in the U. S. District Court for

the Western District of Washington, Southern Division, against the officers of the Department of Labor and Industries of the State of Washington for the purpose of gaining possession of certain warrants on the "Accident Fund" of the State of Washington which had been regularly drawn in the name of certain alien enemies of the United States placed in the custody of such officers but not delivered to the payees at the time the United States entered the World War and at the time that the "Trading with the Enemy Act" was passed and also for the purpose of securing certain voucher or vouchers to be drawn by the officers of the Department of Labor and Industries of the State of Washington against the "Accident Fund," so-called, and upon the State Auditor of the State of Washington for certain claims all of which had been regularly and duly allowed against the said "Accident Fund" in favor of the said alien enemies.

A list of which alien enemies and the amount due each is contained in "Exhibit A" which is attached to the Petition and Affidavit in this action, but which is not printed in the record.

All these claims had been regularly reported to the Alien Property Custodian of the United States either by the officers of the present Department of

Labor and Industries or their predecessors the Industrial Insurance Commission of the State of Washington soon after the United States became involved in the World War and long before the Treaty of Peace had been signed ending the war and a demand thereupon made by the Alien Property Custodian of the United States for the funds represented thereby, he having after investigation found such sums to be alien owned, (see *Clifford v. Miller*, 288 Federal Reporter, page 537); this action resulted in favor of the Custodian and was appealed to this court and affirmed in the above designated case.

Upon the remittitur of the Circuit Court of Appeals being filed and entered by direction of the District Judge, the Department of Labor and Industries delivered to the Custodian the warrants involved in the said action and issued to him one voucher for \$24,348 against the Accident Fund upon the Auditor of the State of Washington in the payment of the claims for which no warrants had been drawn, directing the said defendant and respondent above named as State Auditor of the State of Washington to audit the said claims and issue to Thomas W. Miller, Alien Property Custodian of the United States of America, a warrant

against the "Accident Fund" of the State of Washington in the sum of \$24,348 in payment of the said claims; upon the receipt of the said voucher, the Custodian presented the same to the defendant and respondent as State Auditor at his office at Olympia, Washington, and demanded that he audit the same and issue to him a warrant upon the "Accident Fund" for the amount called for in said voucher and as provided therein. On advice of the Attorney General, who represented the Appellee, in the case above mentioned and who is also the representative of the defendant and respondent herein, the defendant and respondent refused to audit the claims or issue the warrant.

The voucher is in due form and follows the rules and practices of the Department of Labor and Industries (Paragraph IV of Complaint).

Upon the refusal of the defendant and respondent to audit the said voucher and to issue the said warrant the plaintiff and relator above named brought this action of mandamus against the defendant and respondent, secured an Order for an Alternative Writ of Mandamus and an Alternative Writ of Mandamus, which were made returnable before the said District Court (Order granting Alternative Writ of Mandamus and Alternative Writ of Mandamus).

Upon the return day of the Writ, the respondent appeared and demurred to the Petition and Affidavit of the relator, claiming that the court did not have jurisdiction of the persons of the defendant or the subject matter of the action and that said Petition and Affidavit did not state facts sufficient to constitute a cause of action against the defendant and respondent; upon argument before the court the demurrer was sustained solely upon the grounds that the court did not have jurisdiction of the subject matter of the action (Opinion of the Court); upon the rendition of said decision the plaintiff and relator refusing to plead further, the court entered a judgment dismissing the said case for want of jurisdiction (Judgment of Dismissal), to which judgment of Dismissal the plaintiff excepted and his exception was duly allowed (Order of Dismissal); upon the entry of said judgment the plaintiff and relator sued out this Writ of Error, alleging as error the three grounds set forth in his Assignment of Error (Assignments of Error).

The Alien Property Custodian requires the warrant in question that he may collect the amount thereof from the Custodian of the "Accident Fund" and distribute the same to those who by act of Congress may be entitled thereto, for the purpose of carrying out the Treaty obligations of the United

States with the foreign governments of whom such alien enemies are subjects.

The sole question involved in this case is whether or not the action is against the State of Washington, and if so, can it be brought in the said District Court or must the plaintiff and relator apply for his relief to the Supreme Court of the United States.

SPECIFICATIONS OF ERROR.

I.

The United States District Court erred in holding that it did not have jurisdiction of the defendant and respondent and of the subject matter of the action and in sustaining the demurrer of the defendant and respondent to the petition and affidavit of the plaintiff and relator.

II.

The Court erred in entering judgment in favor of the defendant and respondent and against the plaintiff and relator for lack of jurisdiction.

III.

The Court erred in not granting plaintiff and relator a peremptory Writ of Mandamus against the defendant and respondent upon the return made to the Alternative Writ issued in said action.

ARGUMENT.

I.

THE DISTRICT COURT HAD JURISDICTION OF THE SUBJECT MATTER OF THE ACTION AND THE DEMURRER WAS ERRONEOUSLY SUSTAINED.

THE PRESENT ACTION IS NOT ONE AGAINST THE STATE OF WASHINGTON.

In a decision rendered by this court on the 14th day of March last in the case of *Clifford, Superintendent of the Department of Labor and Industries et al. v. Thomas W. Miller, Alien Property Custodian*, 288 Fed. 537, the plaintiff and relator herein was given judgment by the terms of which he was awarded a voucher upon C. W. Clausen, State Auditor of the State of Washington, defendant and respondent herein, for the sum of \$24,348 in payment of certain claims set forth in said voucher. This voucher was issued in compliance with the judgment and is in due form. The present action was brought solely for the purpose of requiring the auditor to issue to the Alien Property Custodian a warrant against the Accident Fund for the payment of said claims in compliance with this voucher. This Court in its opinion clearly set forth the principal provisions of the Workmen's Compensation

Law and the duties of the Department of Labor and Industries of the State of Washington and the State Auditor of the State of Washington in reference thereto. Speaking for the court, Justice Rudkin in this opinion says:

“Speaking generally, the Workmen’s Compensation Act of the State of Washington (Rem. Code 1915, pp. 6604-1 to 6604-32) abolishes civil actions and civil causes of action as between employer and employee, in certain cases, and substitutes a system of compensation in their place. On or before January 15th of each year employers engaged in employments classed as extra hazardous are required to pay into the accident fund in the state treasury a fixed percentage of their total pay roll of that year, and a schedule of awards for injured employees, or their dependents, in case of death, is provided, payable from the accident fund. A department for the administration of the act is created, and claims for compensation must be filed with the department within one year. All claims thus presented are examined by the department, and a court review is provided for. Disbursements out of the accident fund can only be made upon warrants drawn by the State Auditor upon vouchers therefor transmitted to him by the department and audited by him. Such warrants are paid by the State Treasurer out of the accident fund upon which they are drawn. Rem. Code 6604-1 et seq.”

Then after quoting from several decisions of the United States Supreme Court, the matter is summed up as follows: "*Measured by these rules the present suit is not an action against the state.*" *Clifford et al. v. Miller*, 288 Fed. 537.

II.

THE ACTION OF MANDAMUS IS RECOGNIZED BY BOTH STATE AND FEDERAL COURTS AS THE PROPER REMEDY TO COMPEL AN EXECUTIVE OFFICER AS AN AUDITOR TO ISSUE A WARRANT UPON A VOUCHER REGULARLY ISSUED TO HIM BY AN ADMINISTRATIVE OFFICER OR DEPARTMENT.

The leading text writers sustain this principle; Ruling Case Law, vol. 18, sec. 114. The same authority states that mandamus is the usual remedy to compel the drawing of municipal warrants; Ruling Case Law, vol. 18, sec. 148. The decisions of the Supreme Court of the State of Washington adhere to the same principle.

Abernethy v. Town of Medical Lake, 9 Wash. 112, holds that even if the warrant is issued the municipality can not be sued directly, but mandamus must be maintained for its payment.

State of Washington on the relation of *H. A. Porter v. T. E. Headlee, County Auditor*, 19 Wash. 477, holds that mandamus is the proper remedy to compel the issuance of a warrant.

J. Haddock Smith v. Norris Ormsby et al., 20 Wash. 396, holds that where the right to a warrant has been determined by a court that the auditor has no authority to question it and can not refuse to issue it and in the case in question the auditor was not a party to the original action.

In the case of *American Bridge Company v. Wheeler*, 35 Wash. 40, the auditor was mandated to issue a warrant and it was contended that the county was a necessary party and the county commissioners must be joined in the action. The Supreme Court held otherwise.

In the case of *State ex rel. Maddaugh v. Ritter*, 74 Wash. 649, the Supreme Court of the State of Washington held that where a claim had been allowed by the city council that the act of the mayor in signing the warrant and issuing it was a mere ministerial act.

In the case of the *State of Washington ex rel. Beach v. Andrew Oleson*, 91 Wash. 56, the Supreme Court held that the action of a county audi-

tor in issuing a warrant upon a voucher for a claim that had been allowed by the county commissioners was a mere ministerial act and he could be compelled by mandamus to issue it.

In the case of *Savage v. Sternberg*, 19 Wash. 679, 67 A. S. R. 751, an action was brought to collect certain warrants which had been duly and regularly issued and the treasurer was mandamusd for that purpose. It was contended that this was an action against the city and the city was a necessary party defendant, and an application was made to make the City of Tacoma a party defendant. This was denied for the reason that the action was not one against the city.

Perhaps the clearest exposition on the subject by the Supreme Court of the State of Washington is the case of *The State ex rel. Gillette v. C. W. Clausen, State Auditor*, 44 Wash. 437, wherein the auditor as in this case attempted to exercise administrative powers and refused to issue a warrant upon a voucher for a claim that had been regularly passed upon by the Railroad Commissioners. The court compelled him to issue the warrant upon the voucher of the Railroad Commissioners.

The Accident Fund is under the absolute control of the Department of Labor and Industries, as

was stated by this court in the Clifford case. The State Auditor when it comes to the administration of this fund simply acts in a ministerial capacity.

The other state courts have likewise held that the issuance of a warrant by an auditor under the circumstances like that involved in this case was ministerial and that such actions are not against the state.

State v. Toole, 226 Montana 22, 91 A. S. R. 388. In a note by the editors of the American State Reports annotating the case of *Ward v. the Commissioners of Beauford County* (N. C.), 125 A. S. R. 520, the annotater says, "Where the statutes prescribe the amount of the claim so that it is a definitely ascertained demand, the auditing of the demand and the issuance of the warrant for the same is regarded as a ministerial duty even though some degree of discretion is exercised in the matter." A large number of cases are cited in this note, including that of *Roberts v. United States*, 176 U. S. 221, 20 Supreme Court Reports 376, 44 L. Ed. 443. Other cases bearing upon this question were cited in the opinion in the Clifford case, including *The Board of Liquidation et al. v. McComb*, 92 U. S. 534, 541, 23 L. Ed. 623; *Virginia Coupon Cases*, 114 U. S. 270, 293, 5 Supt. Ct. 903,

915, 29 L. Ed. 185; *Pennoyer v. McConnaughy*, 140 U. S. 1, 10, 11 Sup. Ct. 699, 701 (35 L. Ed. 363); *Rolston v. Missouri Fund Commissioners*, 120 U. S. 390, 411, 7 Sup. Ct. 599, 610, 30 L. Ed. 721. The principles announced in the case of *Roberts v. U. S.*, 176 U. S. 221, are most applicable to the present case. The court states them clearly as follows:

“Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law directs him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly

devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

The former decision of this court granting plaintiff and relator a voucher upon the Auditor of the State of Washington becomes an absolute nullity if the Auditor can set himself up as a dictator and claim that it is his duty to refuse to issue warrants for claims that have been duly passed upon by the Department of Labor and Industries and which he has been ordered to recognize. It is well said in the above decision that every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it and when his refusal is brought before the court he might successfully plead that the performance of duty involved the construction of a statute by him, and

therefore it was not ministerial and the court would on that account be powerless to give relief.

III.

THE DISTRICT COURT BY ITS DECISION IN SUSTAINING THE DEMURRER OF THE DEFENDANT AND RESPONDENT TO PLAINTIFF AND RELATOR TO PLAINTIFF'S PETITION AND AFFIDAVIT HAS NOT ONLY REVERSED THE DECISION OF THE CIRCUIT COURT OF APPEALS RENDERED IN THE CASE OF CLIFFORD V. MILLER, 288 FED. 537, BUT IT HAS REVERSED ITSELF.

It is an absurd contention that the plaintiff and relator herein were entitled to a voucher or vouchers upon the State Auditor for a warrant or warrants for the claims in question and that he was not entitled to have a warrant issued upon such voucher. Until this warrant is secured he is in no position to collect the funds represented thereby in any court in any jurisdiction. On this account the case of *Lankford v. Platte Iron Works*, 235 U. S. 461, has no application. The Washington statutes give to the Department of Labor and Industries large discretion, but gives little if any to the State Auditor where claims have been allowed and vouchers issued.

IV.

EVERY FEATURE OF THE TRADING WITH THE ENEMY ACT INVOLVED IN THIS CASE HAS BEEN CONSTRUED AND UPHELD BY THE SUPREME COURT OF THE UNITED STATES.

Central Union Trust Co v. Garvan, 254 U. S. 554, 41 Sup. Ct. 214, 65 L. Ed. 403; *Stoehr v. Wallace*, 255 U. S. 239, 41 Sup. Ct. 214, 65 L. Ed. 604; *Simon v. American Exchange Bank*, 258 U. S. —, 43 Sup. Ct. 165, 67 L. Ed. — (decided in December 1922). See, also, *American Exchange Bank v. Garvan* (C. C. A.), 273 Fed. 43; *Columbia Brewing Co. v. Miller* (C. C. A.), 281 Fed. 289; *In re Miller* (C. C. A.), 281 Fed. 764; *Commercial Trust Company of New Jersey v. Thomas W. Miller, Alien Property Custodian*, the United States Supreme Court Advance Opinions No. 14, May 15, 1923, pages 542 to 546; the *U. S. Trust Company of New York et al. v. Thomas W. Miller, Alien Property Custodian*, United States Supreme Court Advance Opinions No. 14, May 15, 1923, pages 545 to 546; *Charles J. Ahrenfeldt v. Thomas W. Miller, Alien Property Custodian*, United States Supreme Court Advance Opinions No. 14, May 15, 1923, page 546.

THE PROVISIONS OF THE TRADING WITH THE ENEMY ACT ARE STILL IN EFFECT AND THE RIGHTS OF THE CUSTODIAN IN THIS ACTION ARE JUST THE SAME AS THOUGH THE UNITED STATES WERE AT THIS TIME INVOLVED IN WAR.

Commercial Trust Company of New Jersey v. Thomas W. Miller, Alien Property Custodian, United States Supreme Court Advance Opinions No. 14, May 15, 1923, pages 542 to 546. This decision holds that the war power exercised under the Trading With the Enemy Act is legislative, "A court can not estimate the effects of a great war and pronounce their termination at a particular moment of time, and that its consequences are so far swallowed up that legislation addressed to its emergency had ceased to have purpose or operation with the cessation of the conflicts in the field. Many problems would yet remain for consideration and solution, and such was the judgment of Congress, for it reserved from its legislation the Trading with the Enemy Act and amendments thereto, and provided that all property subject to that act shall be retained by the United States until such time as the Imperial German Government * *

shall have * * * made suitable provisions for the satisfaction of all claims. *Kahn v. Anderson*, 255 U. S. 1, 65 L. Ed. 469, 41 Sup. Ct. Rep. 224, and *Vincenti v. United States* (C. C. A.), 272 Fed. 114 and 256 U. S. 700, 65 L. Ed. 1178, 41 Sup. Ct. Rep. 538."

VI.

THE ALIEN PROPERTY CUSTODIAN BECAME VESTED WITH THE TITLE TO ALL SUMS REPRESENTED BY THE CLAIMS DESCRIBED IN THE VOUCHER FOR WHICH A WARRANT HAS BEEN DEMANDED IN THIS ACTION AT THE TIME OF THE DEMAND.

The title to the reserve accident fund which had been set apart for the payment of these claims for which the voucher was issued vested in the Alien Property Custodian early in the year 1918. This was before any of the parties had died as shown by the voucher (if that is of any consequence).

Kohn v. Kohn, 264 Fed. 253;

Miller v. Camp, 286 Fed. 520;

In re Miller, 281 Fed. 762;

Garvan v. \$20,000 Bonds, 265 Fed. 477.

VII.

THE TRADING WITH THE ENEMY ACT IS A WAR MEASURE AND THE PROCEEDINGS WHICH THE ALIEN PROPERTY CUSTODIAN INSTITUTED ARE ON ACCOUNT OF A LEGISLATIVE ENACTMENT UNDER THE WAR POWER OF CONGRESS.

The act provides "The district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees and to issue such process as may be necessary and proper in the premises to enforce the provisions of this act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the act of March third, nineteen hundred and eleven, entitled 'An act to codify, revise, and amend the laws, relating to the judiciary.'" Section 3115½, Trading with the Enemy Act. The act also applies to a body politic, viz., a state.

With this section in force the Alien Property Custodian is required to seek his relief in the District Courts of the United States.

VIII.

THE PRESENT ACTION IS ONE ARISING UNDER THE CONSTITUTION OF THE UNITED STATES AND UNDER A LAW OF CONGRESS. IT IS ONE IN WHICH THE UNITED STATES SUPREME COURT HAS NOT EXCLUSIVE ORIGINAL JURISDICTION, BUT ONLY APPELLATE JURISDICTION.

Numerous well considered decisions of the Supreme court clearly recognize this.

Cohens v. Virginia, 6 Wheaton 393;

Ames v. Kansas, 111 U. S. 462, 28 L. Ed. 487;

Börs v. Preston, 111 U. S. 250, 28 L. Ed. 419.

IX.

THE PRESENT ACTION IS SIMPLY ANCILLARY TO THAT OF CLIFFORD VS. MILLER ABOVE CITED.

It is brought for the purpose of carrying into effect the judgment in the other case. Without the warrant authorized by the voucher which was awarded the appellant in the Clifford case, the voucher will be of no effect.

Gunter v. Atlantic Coast Line R. Company,

200 U. S. 273, 4, 50 L. Ed. 478.

In conclusion we urge that the appellant is entitled to the warrant asked for in his petition for the following reasons:

First: The possession of the fund represented belongs to the Alien Property Custodian of the United States for the purpose of carrying out the acts of Congress.

Second: The action of the Auditor in withholding the warrant from the appellant is arbitrary and is a violation both of the civil and criminal sections of the Trading with the Enemy Act.

Third: The United States District Courts are especially authorized to make all rules, orders, and decisions necessary to carry into effect the act.

Fourth: The action of the defendant is interfering with the carrying out of the treaty obligations of the government by the President of the United States and is interfering with the valid right of the Custodian which he is exercising under the provisions of the Constitution of the United States and the Trading with the Enemy Act passed by Congress for the purpose of putting into effect those constitutional provisions. In the former case

the present Attorney General of the State of Washington appeared and demurred and by his demurrer confessed that the Auditor of the State of Washington was ready and willing to issue the warrant now demanded by the Custodian. He now appears for the State Auditor and upon his advice the Auditor refuses to issue the warrant.

We submit that the action of the state authorities in this matter is unjustifiable from any standpoint. Instead of cooperating and aiding the Custodian in the difficult task of carrying out the reconstruction measures following the great war, they appear and by technical questions of jurisdiction seek to interfere with him and prevent him from carrying out the wish of the President of the United States in making the adjustments and settlements with the foreign governments whose subjects are claimants in the said voucher.

The only return which was made to plaintiff's alternative writ of mandamus was a demurrer which does not question the right of the Custodian to the funds, but simply claims that he did not proceed before the proper tribunal.

In the circumstances we submit that this case should be reversed, with instructions to the District

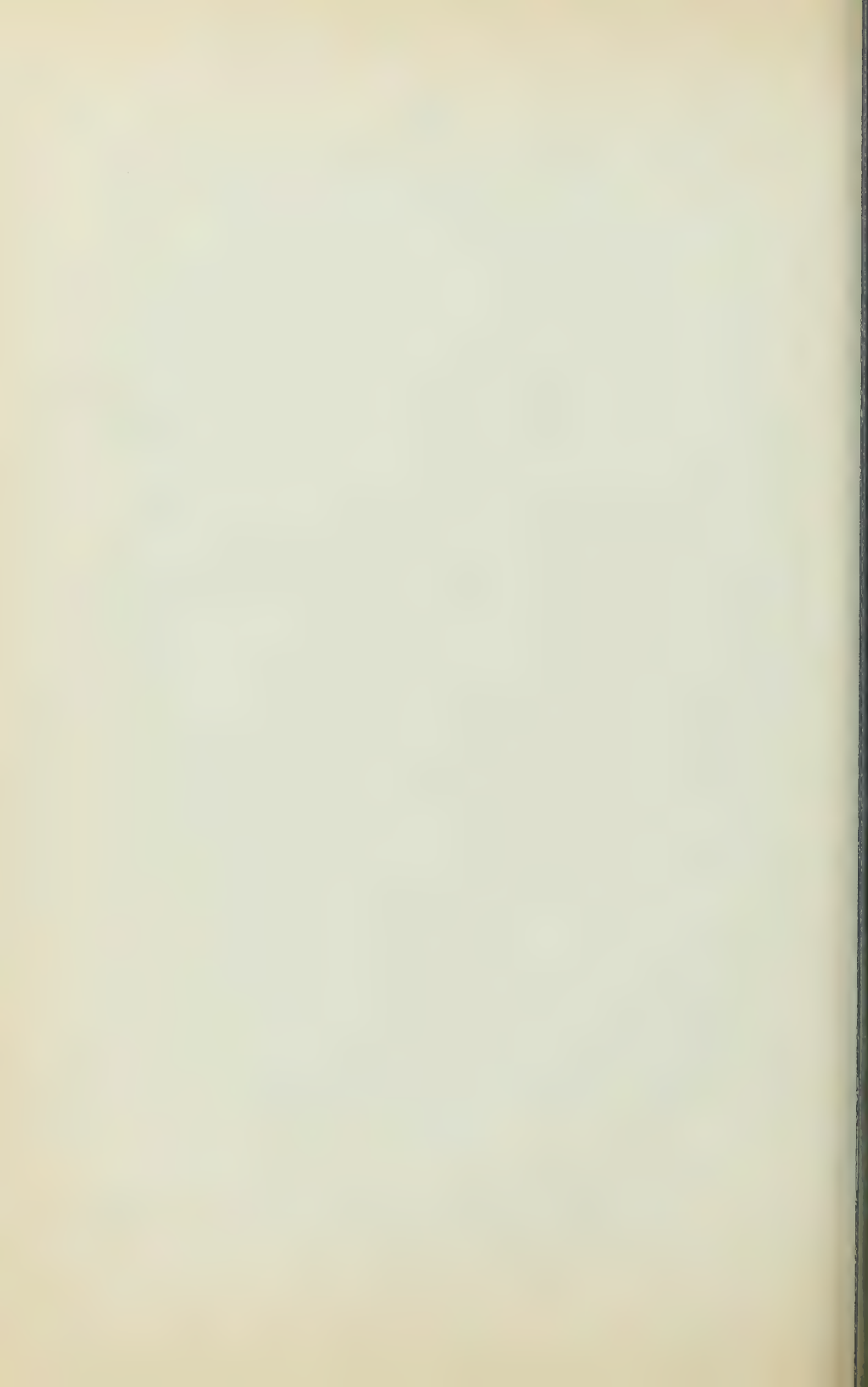
Court to grant to the plaintiff and relator a peremptory writ for said warrant.

THOMAS P. REVELLE,
United States District Attorney,

W. W. MOUNT,
Assistant United States District Attorney,
Attorneys for Plaintiff and Relator in Error.

HARRY G. ROWLAND,
Representative of Alien Property Custodian,

DIX H. ROWLAND,
Counsel for Plaintiff and Relator in Error.



No. 4083 AT LAW.

**In the United States Circuit
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HONORABLE EDWARD E. CUSHMAN, *Judge Presiding.*

**BRIEF OF DEFENDANT AND RESPONDENT
IN ERROR**

JOHN H. DUNBAR,
Attorney General of the State of Washington,

M. H. WIGHT,
Assistant Attorney General of the State of Washington,
Attorneys for Defendant and Respondent in Error.

H. C. BRODIE,
GUE & HALVERSTADT,
Of Counsel.

Office and Postoffice Address: Temple of Justice, Olympia, Washington

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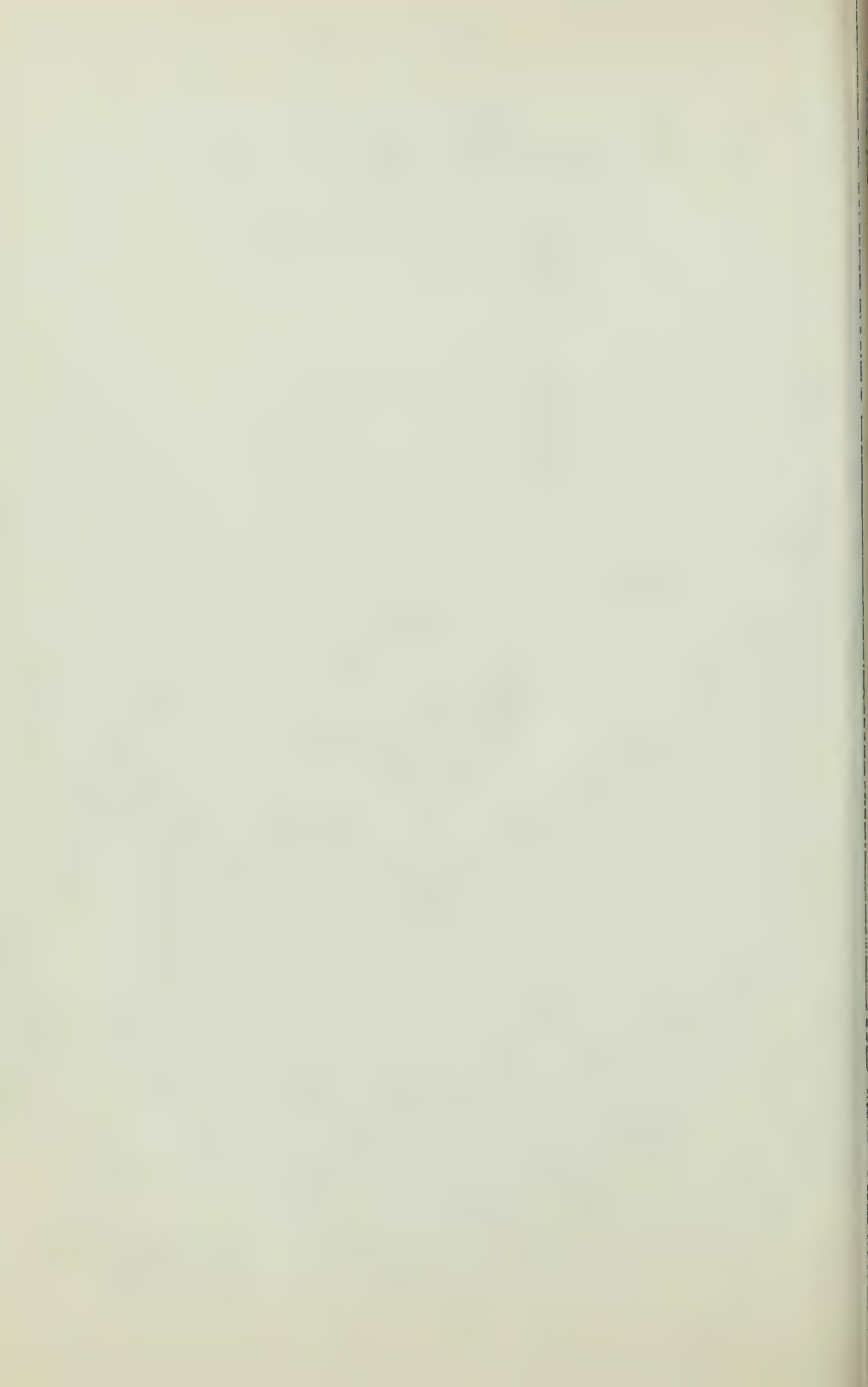
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Attorney General of the State of Washington,

M. H. WIGHT,
Assistant Attorney General of the State of Washington,
Attorneys for Defendant and Respondent in Error.

H. C. BRODIE,
GUTH & HALVERSTADT,
Of Counsel.

Office and Postoffice Address: Temple of Justice, Olympia, Washington



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HONORABLE EDWARD E. CUSHMAN, *Judge Presiding.*

BRIEF OF DEFENDANT AND RESPONDENT IN ERROR

STATEMENT OF THE CASE.

As stated in plaintiff's brief, this is an action instituted by the Alien Property Custodian to compel the auditor of the State of Washington to issue a warrant on a certain voucher heretofore issued to the Alien Property Custodian by virtue of a decree of the District Court which was affirmed by this court.

ARGUMENT.

It is the position of the defendant (1) That this is an action against the State; (2) That the District Court does not have jurisdiction of an action against the State by virtue of section 233 of the Judicial Code, and that said section is not impliedly repealed by section 17 of the Trading with the Enemy Act; (3) That this action is not ancillary to the action of *Clifford v. Miller*, 288 Fed. 537; and (4) That in drawing the warrant demanded in this case the auditor exercises discretionary power and mandamus will not lie.

I.

THIS IS AN ACTION AGAINST THE STATE.

The Workmen's Compensation Act of the State of Washington was enacted by virtue of the police power, and its constitutionality was sustained on that ground. *State v. Mountain Timber Company*, 243 U. S. 219. The preamble to chapter 74, Laws of 1911, is as follows:

“An act relating to the compensation of injured workmen in our industries, and the compensation to their dependents where such injuries result in death, creating an industrial insurance department, making an appropriation for its administration, providing for the creation and disbursement of funds for the compensation and care of workmen injured in hazardous employment, providing penalties for the non-observance of regulations for the prevention of such injuries and for violation of its provisions, asserting and exercising the police power in such cases, and,

except in certain specified cases, abolishing the doctrine of negligence as a ground for recovery of damages against employers, and depriving the courts of jurisdiction of such controversies, and repealing sections 6594, 6595 and 6596 of Remington and Ballinger's Annotated Codes and Statutes of Washington, relating to employes in factories, mills or workshops where machinery is used, actions for the recovery of damages and prescribing a punishment for the violation thereof."

Section 1, chapter 74, Laws of 1911, being section 6604-1, Rem. 1915 Code, contains a declaration of policy reciting that the common law system governing the remedy of workmen against employers for injuries received in hazardous work, is inconsistent with modern industrial conditions and in practice proves to be economically unwise and unfair. That the remedy of the workman has been uncertain, slow and inadequate, that injuries in such employments, formerly occasional, have become frequent and inevitable, and that the welfare of the State of Washington depends upon its industries, and even more upon the welfare of its wage workers, "the State of Washington therefore exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy and sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and

civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

Section 2 provides that while there is hazard in all employment, certain employments have come to be and are recognized as being inherently constantly dangerous. Such employments are designated as "extrahazardous," and those included within the act are enumerated in section 2.

The third section contains a definition of terms not here important.

Section 4 contains a schedule of contribution classifying the industries under the act in the degree of their award, and specifying the percentage that such industries shall pay as premiums on their pay-rolls, into a fund designated as the accident fund.

Section 5 contains a schedule of the compensation to be awarded out of the accident fund, which is the fund composed of the premiums paid in by virtue of section 4 to each injured workman or to his family or dependents, in case of his death, and declares that except as in the act otherwise provided, such payment shall be in lieu of any and all rights of action against any person whatsoever.

Section 8 provides that in case any employer shall default in any payment to the accident fund, the sum due shall be collected by action at law in the name of the state as plaintiff, and such right of action

shall be in addition to any other right of action or remedy.

Section 10 provides that no money paid or payable under this act out of the accident fund shall, prior to issuance and delivery of the warrant therefor, be capable of being assigned, charged, nor even be taken in execution or attached or garnished, nor shall the same pass to any other person by operation of law.

Section 12 provides for the filing of claims by the injured workman or his dependents or beneficiaries in case of his death, and provides that no application shall be valid unless filed within one year after the date upon which the injury occurred or the right thereto accrued.

Section 20 provides that any employer, workman, beneficiary, or person feeling aggrieved at any decision of the department affecting his interests under this act, may have the same reviewed by a proceeding for that purpose in the nature of an appeal initiated in the superior court of the county of his residence.

Section 21 creates a department to administer the act.

Section 24 provides that the department shall have power to promulgate certain rules for the purpose of administering the act.

Section 26 provides that disbursements out of the funds shall be made only upon warrants drawn by the state auditor upon vouchers therefor trans-

mitted to him by the department and audited by him, and that the state treasurer shall pay every warrant out of the fund upon which it is drawn. It also provides that the state treasurer shall be liable upon his official bond for the safe custody of the moneys and securities of the accident fund, "but all the provisions of an act approved February 21, 1907, entitled 'An act to provide for state depositories and to regulate the deposits of state moneys therein,' shall be applied to said moneys and the handling thereof by the state treasurer."

Section 29 appropriates the sum of \$1,500,000.00 out of the general fund for the administrative expenses of the department in administering the act.

Section 31 provides that in case the act shall be hereafter repealed, all moneys which are in the accident fund at the time of the repeal shall be subject to such disposition as may be approved by the legislature.

It will be noted that the defendant, C. W. Clausen, is sued in his official capacity as auditor of the State of Washington and not in his individual capacity. In this action it is attempted to compel him to issue a warrant on a certain voucher heretofore issued to the Alien Property Custodian by the Department of Labor and Industries of the State of Washington in conformity with the judgment in *Clifford v. Miller*, *supra*. As we view it, the test of whether or not an action is one against the state is: Who is affected by the judgment? In the instant case it is apparent

that the defendant in his individual capacity as a citizen would be in no wise affected by any judgment that might be entered in this case, the only effect being that the Alien Property Custodian would have in his possession a warrant drawn against the accident fund of the State of Washington in the custody and control of the State Treasurer. In the case of *State ex rel. Pierce County v. Superior Court*, 86 Wash. 685, it appeared that a taxpayer of Pierce County began an action in the Superior Court of Thurston County, making parties defendant, among others, C. W. Clausen, as State Auditor, and W. R. Roy, as State Highway Commissioner, praying that a certain contract entered into between the county and the paving company be adjudged void, that work be stopped, and that the State Highway Commissioner be enjoined from certifying for payment to the State Auditor any sum of money earned on the contract. This action was then instituted for the purpose of procuring a writ of prohibition against the superior judge of Thurston County seeking to prohibit him from proceeding further in the action. In holding that this second action was, in fact, an action against the state, the court, on page 688, said:

“The suit in question, while in form a suit against certain of its executive officers in their representative capacities, is in essence and effect a suit against the state. The suit is instituted to restrain these officers, the one from certifying that certain sums payable out of the state treasury has been earned in the performance of a contract in which the state has an interest, and the other from drawing warrants on the

state treasury for the payment of such certificates, if any are so presented to him. The funds involved are the funds of the state. The officers sought to be enjoined have no interest in the funds. They are merely the agents of the state by and through whom the state acts. They are not charged with acting in excess of the authority conferred upon them by law, nor is it charged that the law under which they are acting is for any reason void. The charge is, on the contrary, that a contract in which the state has an interest, and which, if valid, makes a charge upon the state's funds, is void because of fraud in its inception. Clearly we think such a suit, even though brought against its officer, must in effect be a suit against the state."

The language there used is applicable to the case at bar, as the funds here involved are funds of the state. The defendant has no interest whatever in the accident fund, and merely acts as an agent of the state in the manner prescribed by state law, nor is it charged that he is acting in excess of his authority or that the law under which he is acting is void. As we will attempt to show in the fourth subdivision of this brief, in passing on this voucher also the auditor has discretionary powers in issuing a warrant from state funds.

The case of *Oregon v. Hitchcock*, 202 U. S. 60, was an action instituted by the State of Oregon against Ethan E. Hitchcock, Secretary of the Interior, and William A. Richards, Commissioner of the General Land Office, to restrain them from allotting or patenting to any Indians or other persons certain lands in the Klamath Indian Reservation,

and praying that the title to such lands be decreed to be in the State of Oregon. In holding that this was, in fact, a suit against the United States, the court, on page 69, said:

“The question of jurisdiction in a case very similar to this was fully considered in *Minnesota v. Hitchcock, supra*. There as here, a state was plaintiff, and the suit was brought against the Secretary of the Interior and the Commissioner of the General Land Office to restrain them from selling school sections 16 and 36 in what was known as the ‘Red Lake Indian Reservation.’ This suit is brought by a state against the same officers, to restrain them from allotting and patenting in severalty swamp lands within the Klamath Indian Reservation. In that case we said (p. 387):

“ ‘Now the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the Government of its title and vest it in the state. The United States is, therefore, the real party affected by the judgment and against which in fact it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a state is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered.’ ”

So, in the case at bar, the defendant has no interest whatever in the outcome of this litigation, nor

will it in any manner affect his interests. By the judgment prayed for in this case defendant would be ordered to deliver to the plaintiff a certain warrant. This warrant is drawn against a public fund in the State Treasury. It consists of involuntary premiums exacted by the state by virtue of its police power from certain employers, and partakes of the nature of a tax. It is thus readily seen that it is at least a material step in lessening a state fund in case the plaintiff is successful in this litigation. This would, of necessity, compel all employers of the State of Washington to pay a higher premium, and thus affect all the people of the state, as can readily be seen by referring to the preamble to the Workmen's Compensation Act of the State of Washington. (Sec. 7673, Rem. Comp. Stat.)

In construing the South Carolina legislation controlling liquor in the case of *Carolina Glass Co. v. So. Carolina*, 240 U. S. 307 (314), the court said:

“Under the provisions of the Constitution (Art. VIII, Sec. 11) and statutes (25 Stat. 463) the county dispensaries are conducted ‘under the authority and in the name of the state.’ Therefore, the officers in charge of them are agents of the state and the funds arising from the sale of liquors through them are the funds of the state, and the debts due for goods sold to them are the debts of the state. In exercising the powers conferred upon it by the legislature, the Dispensary Commission is also the agent and representative of the state, ‘subject to no interference, except that of the General Assembly itself,’ and a suit brought against it is, in effect, a suit against the

state. *State v. Dispensary Commission*, 79 S. Car. 316, 329, 60 S. E. Rep. 928."

In the case of *Lovett v. Lankford*, 145 Pac. 767, it appeared that the plaintiff deposited some moneys with a certain bank which was a member of the state bank guaranty fund, which bank subsequently failed. An action was then instituted against the State Bank Commissioner to recover from the guaranty fund the amount of the deposit. In holding that this was an action against the state, the court, on page 769, said:

"It cannot be questioned that a judgment in this case in favor of plaintiffs in error would directly affect the state and would, in effect, be a judgment against the state and would require the subjection of state funds to satisfy said judgment."

The state guaranty fund does not partake of the nature of a state fund as much as the accident fund here involved. The guaranty fund is composed of moneys involuntarily put up by member banks for the purpose of taking care of depositor members that have failed, whereas the accident fund partakes of the nature of a tax and is involuntarily extracted from certain employers by the state by virtue of its police power.

A case similar to this was taken to the Supreme Court of the United States, being the case of *Lankford v. Platte Iron Works*, 59 Law Ed., page 316, wherein the court said:

"The title of such depositors' guaranty fund vests in the state, just as much so as the common school lands or the proceeds of the sale of the same * * *.

“From this decision it appears that the law intended to give to the state as definite a title to the depositors’ guaranty fund as to the common school fund * * *. In both cases there were ultimate beneficiaries—in the pending case, the bank depositors; in the other case, the creditors of the dispensary. And the purpose of the law—or, if you will, the command of the law—in each case was or is the satisfaction of the claims of those beneficiaries. The fund, having this ultimate destination, does not take its administration from the officers of the state, or subject them to judicial control. We cannot assume that it will not be faithfully managed and applied.”

Again, in the case of *In Re State of New York*, 256 U. S. 490, a libel was filed against three boats for damage caused by a collision, and damage was also asked against Ed. S. Walsh, Superintendent of Public Works of the State of New York, who, it was alleged, was operating said boats. In holding this a suit against the state, the court said (p. 590):

“As to what is to be deemed a suit against a state, the early suggestion that the inhibition might be confined to those in which the state was a party to the record (*Osborn v. U. S. Bank*, 9 Wheat. 738, 846, 850, 857, 6 L. Ed. 204) has long since been abandoned, and it is now established that the question is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record.
* * *

“Thus examined, the decided cases have fallen into two principal classes, mentioned in *Pennoyer v. McConnaughy*, 140 U. S. 1, 10, 11 Sup. Ct. 608 (35 L. Ed. 363):

““The first class is where the suit is brought against the officers of the state, as representing the state’s action and liability, thus making it, though

not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts (citing cases). The other class is where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit * * * is not, within the meaning of the Eleventh Amendment, an action against the state.'

"The first class, in just reason, is not confined to cases where the suit will operate so as to compel the state specifically to perform its contracts, but extends to such as will require it to make pecuniary satisfaction for any liability. *Smith v. Reeves*, 178 U. S. 436, 439, 20 Sup. Ct. 919, 44 L. Ed. 1140."

Testing the present action by the rule announced in this case, it is apparent that this is an action against the state. This is an action brought against an officer of the state as representing the state's action and liability. Of this statement we believe there can be no dispute. This is not an action brought against the defendant claiming to act as an officer of the state and under color of an unconstitutional statute, nor has any act been committed of wrong and injury to the rights of third parties. There is a certain line of cases relied on by counsel for plaintiff to the effect that where an officer, acting under an unconstitutional statute or by no authority of law, commits an act injuring others, that he may not hide behind the cloak of immunity of suit against the state. Obviously, that question is not here involved. This is not an action for damages which arose by

reason of an unlawful act on the part of the defendant, but is an action to compel him to issue a warrant, when, under the statutes of this state, he has discretionary powers in issuing such a warrant. In the case of *Johnson v. Lankford*, 245 U. S. 541, relied upon by plaintiff, it appeared that this was an action instituted against one Lankford, the bank commissioner, for damages against him for certain unlawful acts which he had performed. In holding that this was not an action against the state, the court said:

“There is certainly no assertion of state action or liability upon the part of the state, and no relief is prayed against it. The charges are all against Lankford. The relief sought is against him because of his wilful or negligent disregard of the laws of the state, and it is because of this his surety is charged with liability, it having guaranteed his fidelity.

* * * * *

“The case is not like *Lankford v. Platte Iron Works Co.*, 235 U. S. 461. There the effort was to compel the payment of a claim (certificates of deposit issued by a bank) out of the fund to which the state had a title and which it administered through its officers. Any demand upon it was a demand upon the state and a suit to enforce the demand was a suit against the state, necessarily precluded by the purpose of the law. The case at bar is not of such character. Its basis is Lankford’s dereliction of duty, a duty enjoined by the laws of the state, and the dereliction is charged to have been continuous, overlooking violations of the requirements of law by the bank officials by which it was brought to insolvency, knowing of the depletion of its assets, knowing of the reduction of its reserves, and not requiring their repair. A further dereliction is charged after Lankford took possession and such arbitrary conduct and

preferences that plaintiff's claim was subordinated to other claims of like character."

The theory upon which this court held that the case of *Clifford v. Miller*, *supra*, was not an action against the state, was that the state officials had certain property in their possession which they were unlawfully holding from the Alien Property Custodian by virtue of the decision of the United States Supreme Court in the case of *Central Union Trust Co. v. Garvan*, 254 U. S. 554, as evidenced by the following language in the opinion of the court in that case:

"No relief whatever is sought against the state and no attempt is made to control the discretion of its executive officers or to administer funds in the public treasury. In this respect the case differs widely from *Lankford v. Platte Iron Works*, 235 U. S. 461, 35 Sup. Ct. 173, 59 L. Ed. 316, and kindred cases cited by the appellants. In the *Lankford* case the court awarded a money judgment to the plaintiff and decreed that it was entitled to have the same paid out of the depositors' guaranty fund created under and by virtue of the laws of the state of Oklahoma. Had the appellee here sought the same measure of relief, there would be some analogy between the two cases. But, as already stated, neither the state nor its funds are affected by the decree in the remotest way, and no attempt is made to control the judgment or discretion of state officers." (*Clifford v. Miller*, 288 Fed. 537, 540.)

It was apparently the theory of this court that the reason that the state funds were not affected by the decree in the case of *Clifford v. Miller* was that in the possessory action instituted by the Alien Prop-

erty Custodian he merely was entitled to naked possession of the property so that it might be forthcoming in event it subsequently was shown that the money was due an alien. The present action is not a possessory one for the reason that the auditor has nothing in his possession to turn over to the Alien Property Custodian. On the contrary, he is asked to perform an official act and produce and bring into existence an evidence of indebtedness of the State of Washington. For this reason the case of *Clifford v. Miller, supra*, is squarely in point in holding that this is an action against the state, for the reason that the issuance of a warrant not yet in existence is certainly a material step in lessening and affecting a state fund, and for the further reason that it is an attempt to control the discretion of the executive officers of the state in administering its funds. Certainly the issuance of a warrant is at least a material step in administering the funds of this or any other state. From a careful examination of the cases on this question we believe that this is the first attempt in the history of American jurisprudence of the courts of the United States to attempt to control the discretion of the executive officers of a state in administering its funds.

II.

SECTION 17 OF THE TRADING WITH THE ENEMY ACT
DOES NOT REPEAL SECTION 233 OF THE
JUDICIAL CODE.

(a) The Trading with the Enemy Act does not apply to a state.

The Trading with the Enemy Act was enacted as a war measure for the purpose of restraining persons owing money to an alien enemy from turning such moneys over to an alien enemy, and thus give aid and comfort to a country and its inhabitants waging war against this country. In determining the intent of Congress in passing this act, it is submitted that Congress had no apprehension that one of the component states of this Union would give financial aid to alien enemies, and this is strengthened by the fact that in defining the word "person," the term "state" is not used, but rather the vague term "body politic," which counsel for the plaintiff strenuously contends includes a state. The term "person," in section 2, subdivision (c) (Fed. Stat. Ann., 1918 Supp., p. 848) of the Trading with the Enemy Act, is defined as follows:

"The word 'person,' as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic."

Counsel devotes considerable space in his brief in an effort to show that the term "body politic" in that section must be intended to include a state.

Before proceeding with our argument on this question, we desire to call the court's attention to the fact that section 233 of the Judicial Code provides that the United States Supreme Court shall have exclusive jurisdiction of an action against a state, whereas section 17 of the Trading with the Enemy Act provides, in substance, that the District Courts of the United States shall have jurisdiction to make and enter all such rules as to notice and otherwise and to issue such process as may be necessary and proper to enforce the provisions of this act. While a number of courts have had occasion to construe the term "body politic," in connection with particular statutes, it has never been construed in any court in such a manner as to hold that it gives an inferior Federal Court jurisdiction over the state in its sovereign capacity in an action brought in such inferior court against the state. The phrase "body politic" has a very wide and all-embrasive meaning when used in a general sense, and the courts have construed it to include every imaginable political corporate entity from an institution of learning—*School Board v. Meredith*, 71 So. 209—to the United States of America in the citation in counsel's brief on page 16. Incidentally, we might say that Chief Justice Marshall's definition of the United States as a body politic and corporate was in a general sense, and not for the purpose of construing a statute in which the term "body politic" had been used.

If it were not for other constitutional and statutory provisions, the term is unquestionably broad enough to include the state, but inasmuch as it is a general term which includes all possible bodies politic and corporate within the United States, and would therefore include drainage districts, irrigation districts, towns, cities and numerous other political subdivisions, as to all of which there is no constitutional or statutory inhibitions to prevent jurisdiction of the court attaching while in the case of a state there are such constitutional and statutory prohibitions, the intention of Congress to repeal such provisions by the use of a term of such general and indeterminate significance, and bring a sovereign state within the jurisdiction of the inferior Federal Courts must be plainly apparent. If section 233 of the Judicial Code, which gives the United States Supreme Court exclusive jurisdiction of an action against the state is repealed by the Trading with the Enemy Act, it is repealed by implication and by virtue of a construction to the effect that a state is, in fact, a body politic. It is submitted that if such a repeal were intended or had actually taken place, that Congress would have used the word "state" and not the loose and vague term "body politic."

(b) Intention to repeal section 233, Judicial Code, must be plainly apparent in view of special dignity accorded state by Federal Courts.

The first Congress in the Act of September 24,

1789, chapter 20, section 13, 1 Stat. at L., 80, provided as follows:

“The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states or aliens, in which latter cases it shall have original but not exclusive jurisdiction.”

This provision is now incorporated in section 233 of the Judicial Code in the following language:

“The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction, of all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul is a party.”

This provision for exclusive jurisdiction of the Supreme Court of the United States in actions against the state has remained the supreme law of the land for 134 years.

It has been held under this section that a state, if it sees fit, may submit to the jurisdiction of the inferior courts, and the state, as plaintiff, may therefore select such court as it may see fit, but there has never been a case, so far as we have been able to discover, where any court has held that the state can

be sued in its sovereign capacity, without its consent in any court except the United States Supreme Court. The courts of the United States have always been scrupulously careful in their recognition of the respect due the dignity of a sovereign state, and it was deemed incompatible with such dignity to compel a sovereign state to submit unwillingly to the jurisdiction of any court of less solemn power than the Supreme Court of the land.

“That a Circuit Court of the United States has not jurisdiction, under existing statutes, of a suit by the United States against a state, is clear; for by the Revised Statutes it is declared—as was done by the Judiciary Act of 1789—that ‘the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a State and its citizens, or between a State and citizens of other states or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction.’ Rev. Stat., sec. 687; Act of September 24, 1789, c. 20, sec. 13; 1 Stat. 80. *Such exclusive jurisdiction was given to this court, because it best comported with the dignity of a State, that a case in which it was a party should be determined in the highest, rather than in a subordinate judicial tribunal of the nation.* Why then may not this court take original cognizance of the present suit involving a question of boundary between a Territory of the United States and a State?” *U. S. v. Texas*, 143 U. S. 621, 36 L. ed. 285. (Italics ours.)

This same thought is also embodied in the case of *Ames v. Kansas*, 111 U. S. 449, 464, 28 L. ed. 482, in the following language:

“It thus appears that the first Congress, in which were many who had been leading and influential

members of the convention, and who were familiar with the discussions that preceded the adoption of the Constitution by the States and with the objections urged against it, did not understand that the original jurisdiction vested in the Supreme Court was necessarily exclusive. That jurisdiction included all cases affecting ambassadors, other public ministers and consuls, and those in which a State was a party. The evident purpose was to open and keep open the highest court of the nation for the determination, in the first instance, of suits involving a State or a diplomatic or commercial representative of a foreign government. So much was due to the rank and dignity of those for whom the provision was made; but to compel a State to resort to this one tribunal for the redress of all its grievances, or to deprive an ambassador, public minister or consul of the privilege of suing in any court he chose having jurisdiction of the parties and the subject matter of his action, would be, in many cases, to convert what was intended as a favor into a burden.

* * * * *

“With respect to states, it was provided that the jurisdiction of the Supreme Court should be exclusive in all controversies of a civil nature where a state was a party, except between a state and its citizens, and except also, between a state and citizens of other states or aliens; in which latter case its jurisdiction should be original but not exclusive. Thus the original jurisdiction of the Supreme Court was made concurrent with any other court to which jurisdiction might be given in suits between a state and citizens of other states or aliens. No jurisdiction was given in such cases to any other court of the United States, *and the practical effect of the enactment was, therefore, to give the Supreme Court exclusive original jurisdiction in suits against a state begun without its consent*, and to allow the state to sue for itself in any tribunal that could entertain its case. In this way *States*, ambassadors and public

ministers *were protected from the compulsory process of any court other than one suited to their high positions*, but were left free to seek redress for their own grievances in any court that had the requisite jurisdiction. No limits were set on their powers of choice in this particular. This, of course, did not prevent a state from allowing itself to be sued in its own courts or elsewhere in any way or to any extent it chose." (Italics ours.)

The recognition accorded state sovereignty is to be found in many different lines of decisions of the Supreme Court of the United States. One familiar example is the requirement in rate cases that state remedies must be first exhausted before recourse may be had to the Federal Courts, under the rule of comity and convenience laid down in the case of *Prentis v. Atlantic Coast Line*, 211 U. S. 210, and followed in numerous later cases.

It is evident that a statute relative to the exclusive jurisdiction of the Supreme Court of the United States which has been observed for one hundred and thirty-four years is not to be entirely set aside or disregarded, nor can the intention be imputed to Congress to repeal such a provision in the Trading with the Enemy Act unless the intention clearly appears. As set forth above, the only possible ground to base such a supposition upon is that a state is to be included among the bodies politic referred to in the Trading with the Enemy Act.

(c) Repeals by implication not favored.

Section 17 of the Trading with the Enemy Act reads as follows:

“That the District Courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled ‘An act to codify, revise and amend the laws relating to the judiciary’.”

The Trading with the Enemy Act is an act complete within itself and contains no direct repeal of any previous legislation, and if there be a repeal of section 233 of the Judicial Code, it must be by implication. It is a rule observed, we believe, by all courts that repeals by implication are not favored, and if two acts apparently in conflict may be reconciled, such reconciliation will be effected rather than to hold that one act repeals the other. In the present case reconciliation is very easy. The term “body politic” being of such general significance, can be easily applied to all bodies politic except the state, and by reason of the long standing law upon the subject of jurisdiction over the state, it can be properly concluded that Congress did not intend to confer jurisdiction over the state upon the District Court. We do not dispute the power of Congress to confer such jurisdiction under its war powers, but contend

that even under a war act the intention to overthrow a provision of such importance and one so long recognized and observed by our courts, must be plainly apparent and not inferred from general language. The rule relative to repeals by implication is well stated in Lewis' Sutherland on Statutory Construction, Vol. 1, page 247, as follows:

“When some office or function can, by fair construction, be assigned to both acts, and they confer different powers to be exercised for different purposes, both must stand, though they were designed to operate upon the same general subject * * *. The earliest statute continues in force unless the two are clearly inconsistent with, and repugnant to each other, or when in the latter statute some express notice is taken of the former plainly indicating an intention to repeal it, and where two acts are seemingly repugnant they should, if possible, be so construed that the latter may not operate as a repeal of the former by implication.”

The same rule is given in every text book on interpretation of statutes and innumerable cases cited in support thereof. We will not burden this court with citations of such a familiar rule other than to call their attention to the case of *United States v. Barnes*, 222 U. S. 513, 520, 56 L. ed. 291, 293, where the court says:

“Much of our national legislation is embodied in codes, or systematic collections of general rules, each dealing in a comprehensive way with some general subject, such as the customs, internal revenue, public lands, Indians, and patents for inventions; and it is the settled rule of decision in this court that where

there is subsequent legislation upon such a subject, it carries with it an implication that the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears. Thus, in *Wood v. United States*, 16 Pet. 342, 363, 10 L. ed. 987, 995, where a question arose as to what effect should be given a general provision of an early customs law in view of a later enactment upon that subject, it was said: 'And it may be added that, in the interpretation of all laws for the collection of revenue, whose provisions are often very complicated and numerous to guard against frauds by importers, it would be a strong ground to assert that the main provisions of any such laws sedulously introduced to meet the case of a palpable fraud should be deemed repealed, merely because in subsequent laws other powers and authorities are given to the customhouse officers, and other modes of proceeding are allowed to be had by them before the goods have passed from their custody, in order to ascertain whether there has been any fraud attempted upon the government. The more natural, if not the necessary, inference in all such cases is, that the legislature intend the new laws to be auxiliary to and in aid of the purposes of the old law, even when some of the cases provided for may equally be within the reach of each. There certainly, under such circumstances, ought to be a manifest and total repugnancy in the provisions to lead to the conclusion that the latter laws abrogated, and were designated to abrogate, the former.' "

The provisions regarding the jurisdiction and proceedings of the federal courts have been for many years embodied in a judicial code, and the foregoing statement of the court is quite pertinent when any contention is made that a provision of the judicial code relative to jurisdiction of the Supreme Court

of the United States has been changed by implication in any statute.

In view of the fact that section 233 of the Judicial Code expressly states that the Supreme Court of the United States shall have exclusive jurisdiction in actions against the state, and that the Trading with the Enemy Act only provides that the District Courts shall have jurisdiction of actions instituted by the Alien Property Custodian against persons, including a body politic, and does not state that the District Courts shall have jurisdiction of actions against a state, it is submitted that there has been no repeal by implication, which repeals are not favored in law. Nor is there such a direct conflict between the two statutes that one must fail if both be given effect.

Section 2, Article III of the Constitution of the United States, reads, in part, as follows:

“In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.
* * * ”

It will thus be noted that the Constitution states that where a state is a party, the Supreme Court of the United States shall have original jurisdiction, whereas, section 233 of the Judicial Code, states that in civil actions in which a state is a party, the Supreme Court shall have exclusive jurisdiction. In the

earlier cases some claim was made that original jurisdiction as used in the Constitution amounted, in fact, to exclusive jurisdiction, but this contention was finally refuted by the courts in cases in which a state was the plaintiff. Great reliance is placed by counsel for the plaintiff on some of the cases holding to this effect.

The case of *Cohens v. Virginia*, 6 Wheat. 264, is in no way applicable, as that was the first case which held that where the state was a plaintiff, a writ of error would lie to the Supreme Court of the United States from a decision of the highest state tribunal. In so holding the court said:

“The Constitution declares that in cases where a state is a party, the Supreme Court shall have original jurisdiction, but does not say that its appellate jurisdiction shall not be exercised in cases where from their nature appellate jurisdiction is given whether a state be or be not a party. It may be conceded that where the case is of such a nature as to admit of its originating in the Supreme Court, it ought to originate there, but where from its nature it cannot originate in that court these words ought not to be so construed as to require it.”

In that case the state was a party plaintiff and the constitutional provision alone was considered which stated that the Supreme Court had original jurisdiction, but that in a proper case where the state was a plaintiff it might also exercise appellate jurisdiction. In the case of *Bors v. Preston*, 111 U. S. 252, it appeared that one Preston sued Bors, who was a consul for the kingdoms of Norway and Sweden,

in the Circuit Court of the United States. The question was raised as to the jurisdiction of this court. The constitutional provision above quoted states that the Supreme Court of the United States shall have original jurisdiction in actions in which a consul is a party. Section 233 of the Judicial Code also provides that the United States Supreme Court shall have original, but not exclusive, jurisdiction of actions in which a consul was a party. It was there held that although the Constitution invested the Supreme Court with original jurisdiction in cases affecting consuls, it was competent for Congress to confer concurrent jurisdiction in those cases upon such inferior courts as might by law be established. That case is obviously not in point by reason of the fact that Congress has never enacted any legislation stating that the Supreme Court of the United States shall have exclusive jurisdiction in actions where a consul is a party, as they have done in section 233 of the Judicial Code, in cases where a state is a party.

Neither is the case of *Ames v. Kansas*, 111 U. S. 449, in point, as that also was an action in which a state was not a defendant, but a party plaintiff. In holding that there was a vital distinction in cases where the state was a defendant, the court said:

“No jurisdiction was given in such cases to any other court of the United States, and the practical effect of the enactment was therefore to give the Supreme Court exclusive original jurisdiction in suits against the state begun without its consent, and to

allow the state to sue for itself in any tribunal that could entertain its case.”

III.

THIS ACTION IS NOT ANCILLARY TO THE CASE OF
MILLER V. CLIFFORD, 288 FED. 537.

In support of a contrary conclusion, counsel for plaintiff cites one case, *Gunter v. Atlantic Coast Line Railway Co.*, 200 U. S. 273, 50 L. Ed. 478. The proper rule governing this proceeding, however, is the following:

“Ancillary nature of proceeding. Jurisdiction will not be entertained of suits or proceedings which are not properly ancillary to the original one, unless they are otherwise within the original jurisdiction of the court, but in order that a federal court may have jurisdiction of a suit or other proceeding as dependent, a dependent cause of action is indispensable. * * * After the determination of the original cause, jurisdiction will not be extended to other questions and issues raised by a supplemental bill filed after such determination.” 25 C. J. 698. *Pell v. McCabe*, 250 U. S. 573, 63 L. ed. 1147; *Stillman v. Combe*, 197 U. S. 436, 49 L. ed. 822; *H. C. Cook Co. v. Beecher*, 217 U. S. 497, 54 L. ed. 855; *Raphael v. Trask*, 194 U. S. 272, 48 L. ed. 973; *Christmas v. Russell's Executors*, 14 Wall. 69, 20 L. ed. 762; *G. & C. Merriam Co. v. Saalfeld*, 241 U. S. 22; 60 L. ed. 868; *Supreme Tribe of Ben Hur v. Cobble*, 264 Fed. 247; *Montgomery v. McDermott*, 103 Fed. 801; *Woerheide v. H. W. Johns-Manville Co.*, 199 Fed. 535; *Central Trust Co. v. Chicago, R. I. & P. Railway Co.*, 224 Fed. 706; *Anglo-Florida Phosphate Co.*

v. McKibbin, 65 Fed. 529; *Winter v. Swinburne*, 8 Fed. 49.

We believe that this case falls clearly within the foregoing rule and citations and that this is not an action ancillary to the former case of *Clifford v. Miller, supra*. A comparison of the subject matter involved in that suit, the relief sought and the defendant therein, with the subject matter, relief and defendant in this action will show clearly that the two proceedings are entirely separate and distinct and that this action is an original action.

The case of *Miller v. Clifford*, as it was entitled in the district court was a suit in equity for the sole purpose of obtaining possession of certain warrants and compelling the issuance of certain vouchers and to obtain possession of such vouchers when issued. It was directed against the superintendent of the Department of Labor and Industries of the state of Washington and the Supervisor of Industrial Insurance of the said department and state. As expressly indicated in the opinion in the case of *Clifford v. Miller, supra*, no relief was sought against the state and no attempt made to administer funds in the public treasury. After the final decree was entered in that suit the vouchers involved therein were issued by the Department of Labor and Industries and such vouchers and warrants were delivered to the Alien Property Custodian. Upon the delivery of these documents full relief sought by that suit had been obtained and the matter was finally determined.

No further action was required thereunder by either the Alien Property Custodian or the defendant in that suit. That suit did not involve the validity of such vouchers or warrants, but the sole subject matter of the litigation was the possession of these papers.

The present proceeding is an action at law in the form of mandamus to compel the State Auditor to draw a warrant on the public treasury of the state of Washington. The defendant in this action is the State Auditor of the state of Washington. He was not a party to the former suit and had no opportunity to contest the legality and validity of the vouchers involved in that suit. We think that after an examination of the foregoing cases and a comparison of the equity suit of *Clifford v. Miller* and this law action of *Miller v. Clausen*, the conclusion cannot be escaped that the present action is not ancillary to the former, but must be considered an independent original proceeding in the district court.

We do not think that anything can be found in the case of *Gunter v. Atlantic Coast Line*, *supra*, which is contrary to the rule above set forth, while there is much in that case, we think, adverse to counsel's contention. The *Gunter* case was the outgrowth of the earlier case of *Humphrey v. Pegues*, 16 Wall. 244, 21 L. ed. 326, decided by the Supreme Court of the United States in 1873. In the *Pegues* case a permanent injunction was granted to restrain the county treasurers of certain counties in South Caro-

lina from assessing and collecting taxes from certain railway companies. An examination of that case will show that no question of jurisdiction was raised, nor any question that the suit was against the state of South Carolina. The injunction thus granted was observed and no taxes were attempted to be collected from the railway companies for twenty-five years. Then the state of South Carolina, by legislative action, attempted to authorize such taxation and the county officials endeavored to collect from the Atlantic Coast Line Railway Company, the successor in interest of the companies involved in the *Pegues* case, and the railway company took steps to prevent the assessment and collection of such taxes. Although this proceeding was more than twenty-five years after the *Pegues* case, we call attention to the following statement in the *Gunter* case, 200 U. S., page 281, 50 L. ed., 483.

“The petition which initiated the proceeding was filed as ancillary to the original *Pegues* case, and was entitled and numbered as that cause.”

Counsel in this case has not followed such practice, but has given this action a new title and it has been docketed under a new number. Furthermore, counsel has not in this action set forth the decree in the former action, but has only alleged in his petition certain erroneous conclusions of law as to the effect of the decree in the former suit.

Although in the *Pegues* case the jurisdictional question was not raised, the supreme court in the

Gunter case by an elaborate train of reasoning shows that in the *Pegues* case the state of South Carolina was the real party in interest and waived any objections that might have been raised to the jurisdiction, and jurisdiction having attached in that original proceeding would be retained in the ancillary proceeding, although that also was against the state as the real party in interest. The court says on page 292, 200 U. S. and page 487, 50 L. ed.:

*“None of the prohibitions, therefore, of the amendment or of the statute relate to the power of a Federal Court to administer relief in causes where jurisdiction as to a state and its officers has been acquired as a result of the voluntary action of the state in submitting its rights to judicial determination. To confound the two classes of cases is but to overlook the distinction which exists between the power of a court to deal with a subject over which it has jurisdiction, and its want of authority to entertain a controversy as to which jurisdiction is not possessed. From this it follows that, as in the *Pegues* case, the court had acquired jurisdiction, with the assent of the state of South Carolina, to determine as to it the controversy presented in that case, the right of the court to administer relief—to make its decree effective—cannot be measured by constitutional or statutory provisions relating to original proceedings where jurisdiction over the controversy did not obtain.”* (Italics ours)

In the case of *Clifford v. Miller* the state never consented to the jurisdiction, but was overruled, the circuit court holding that the state was not a party in that suit. The state does not consent to jurisdiction in this case, and for the reasons indicated, holds

that this is an original action and not an ancillary proceeding and the situation is therefore entirely different from the situation in the *Gunter* case.

As stated in the case of *Clifford v. Miller, supra*:

“But as already stated, neither the state nor its funds are affected by the decree in the remotest way, and no attempt is made to control the judgment or discretion of state officers.”

The decree in that case simply ordered the defendants to turn over to the Alien Property Custodian certain warrants in his possession and to issue a voucher for other warrants. That decree was completely complied with, which brought about a final determination of the action in that case, so that the present action must be and is an independent one. Furthermore, the parties to the two actions are not the same, as in the case of *Clifford v. Miller*, the Circuit Court of Appeals held that the state was not a party defendant but that the officers were defendants and were wrongfully withholding possession of property in their possession to which the plaintiff was entitled. The State of Washington, in the present action, is the real defendant, and the State Auditor the nominal defendant, so that even the parties to the action are not the same. Furthermore, in the case of *Gunter v. Atlantic Coast Line Railway Co., supra*, the real issue was not whether the second action was ancillary to the first, but whether the injunction issued in the first action was *res adjudicata* as to the issues involved in the second action.

IV.

THE STATE AUDITOR HAS DISCRETION IN ISSUING
WARRANTS AND MANDAMUS DOES NOT LIE
TO CONTROL SUCH DISCRETION.

Section 7705, Rem. Comp. Stat., which is a part of the workmen's compensation act, provides in part as follows:

"Disbursement out of the funds shall be made only upon warrants drawn by the state auditor upon vouchers therefor transmitted to him by the department and *audited by him*."

The term "audit" has been frequently construed by the courts. Typical definitions are:

"To "audit" is to hear, to examine an account, and in its broader sense it includes its adjustment or allowance, disallowance or rejection.' *People ex rel. McCabe v. Matthies*, 72 N. E. 103, 104, 179 N. Y. 242 (quoting and adopting definition in *People ex rel. Myers v. Barnes*, 114 N. Y. 317, 323, 2 N. E. 609, 610; *People v. Board of Apportionment and Audit*, 52 N. Y. 224, 227). For the same or substantially similar definitions, see *People ex rel. Andrus v. Board of Sup'rs of Saratoga County*, 94 N. Y. Supp. 1012, 1013, 106 App. Div. 381; *People ex rel. Ramsdale v. Board of Sup'rs of Orleans County*, 38 N. Y. Supp. 890, 16 Misc. Rep. 213, 214."

"To 'audit' is to hear and examine an account and includes its adjustment, allowance or disallowance at some definite sum. A report of auditors that they have allowed a certain claim at a sum not to exceed a specified amount is not sufficient to constitute an 'audit'. *Stemmler v. Mayor, etc., of City of New York*, 72 N. E. 581, 583, 179 N. Y. 473."

"The meaning of the phrase 'to audit', when applied to claims against towns, cities or counties, means to hear, to examine an account, and, in its

broader sense, includes its adjustment or allowance, disallowance, or rejection; and the verb, 'audit', as so used, means simply to examine, to adjust, and clearly implies the exercise of judicial discretion. Where a city officer presents his accounts to a board having power to audit them, and fails to charge himself with moneys received, of which failure the board has no knowledge, its audit of his account is not binding upon the city in favor of such officer or his sureties as to the amounts not accounted for by him. *City of Syracuse v. Roscoe*, 123 N. Y. Supp. 403, 408, 66 Misc. Rep. 317."

Even though there were no other statutory duty imposed upon the auditor, it is evident that under his instructions to audit vouchers of the Department of Labor and Industries prior to drawing a warrant in payment thereof, he not only may but should exercise his discretion as to the legality and sufficiency of the voucher.

But the statutes of the state of Washington have made it his specific duty to exercise such discretion, as will be found by an examination of the following sections of Rem. Comp. Stat.:

Section 11001: "It shall be the duty of the auditor,—

"1. To audit, adjust, and settle all claims against the state, payable out of the treasury, except only such claims as may be expressly required by law to be audited and settled by other officers or persons;
* * *

"16. In his discretion, to require any person presenting an account for settlement to be sworn before him, and to answer, orally or in writing, as to any facts relating to it."

Section 11007: "All persons having claims against the state shall exhibit the same, with the evidence in support thereof, to the auditor, to be audited, settled, and allowed, within two years after such claim shall have accrued, and not afterwards. And in all actions brought in behalf of the state, no debt or claim shall be allowed against the state as a set-off, but such as has been exhibited to the auditor, and by him allowed or disallowed, except only in cases where it shall be proved to the satisfaction of the court that the defendant at the time of trial is in possession of vouchers which he could not produce to the auditor, or that he was prevented from exhibiting the claim to the auditor by absence from the state, sickness, or unavoidable accident."

Section 11013: "The auditor, whenever he may think it necessary in the settlement of any account or the drawing of any warrant, may examine the party, witnesses, and others on oath or affirmation touching any matter material to be known in the settlement of the account or the drawing of the warrant, and for that purpose he may issue summons and compel witnesses to attend before him and give testimony in the same manner and by the same means allowed in courts of record, and he shall reduce such evidence to writing, and file the same in his office."

These general statutory instructions to the auditor, coupled with the provision in the workmen's compensation act that warrants shall be issued only after the vouchers have been audited by the state auditor, can leave no doubt that the auditor has a discretion to exercise and that it is his duty to exercise such discretion and carefully examine and test all vouchers before issuing warrants thereon. This was fully recognized by the District Court in this case, as

after citing the statutes above enumerated, the court in its memorandum decision stated:

“On the part of the relator it is contended that under section 7705, Remington’s Compiled Stats., *supra*, the duties of the Auditor concerning the issuing of a warrant are purely ministerial; that all discretion in the matter is exhausted when the Director as, under Section 7703, Remington’s Comp. Stat., ascertained and established the amounts to be paid and issued a certificate for benefits accrued.

“The Court is constrained to give effect to each word of the statute, unless to do so would clearly tend to defeat or impair the legislative intent. The Court cannot say, in view of the language of Section 7705, but that it was intended the Auditor should exercise a supervisory power and discretion concerning the acts of the Director, or it may have been intended that he, in his discretion, should consider matters supplemental to the Auditor’s determination, as in case of death of a beneficiary after certificate or voucher issued. In either event, he is vested with a discretion in the matter.”

The right of the state auditor to exercise discretion in the instant case is particularly apparent when some consideration is devoted to the nature of the voucher which the relator demands the auditor shall issue a warrant to cover. An examination of the record in the case of *Clifford v. Miller*, 288 Fed. 587, will show that the Department of Labor and Industries had a number of claims pending, the beneficiaries of which claims were alien enemies. Although these claims had been approved, vouchers had not been issued to cover, and it was well known by the officials of the Department of Labor and In-

dustries that on account of the conditions existing in Europe due to the war, many of the beneficiaries of such claims had died or remarried or were otherwise incompetent to receive the amount of such claims, and while no action had been taken to cancel such approved claims, it was not deemed advisable to prepare vouchers and submit same to the auditor for warrant.

Section 7679, Rem. Comp. Stat., provides in part as follows:

“* * * (1) If the workman leaves a widow or invalid widower, a monthly payment of thirty dollars (\$30) shall be made throughout the life of the surviving spouse, to cease at the end of the month in which remarriage shall occur * * *.”

The final exercise of discretion in this matter by the Department of Labor and Industries was rendered impossible by the decision in the case of *Clifford v. Miller, supra*, which directed the Department of Labor and Industries to prepare voucher on these claims and deliver such voucher to the Alien Property Custodian. One voucher was made in a lump sum covering all of these claims, and it is this voucher for which relator in error is now demanding warrant from the Auditor. This voucher covers all claims, the beneficiaries of which were alien enemies up to the time of the proclamation of peace. This action is the first demand on the auditor to issue a warrant on such claims, and is the first opportunity he has had to exercise his discretion in passing upon the validity of the voucher which is evidently based upon

claims, many of which are not now payable. In view, therefore, of the statutory discretion vested in the auditor and the peculiar conditions surrounding the issuance of the voucher in question, it was the duty of the auditor to examine such voucher and if, as a result of such examination, he was satisfied that the claim was not proper, to decline to issue a warrant therefor.

We have heretofore shown that this action is an action against the state of Washington, but irrespective of such fact, a writ of mandamus will not issue in any event to control discretion of an auditor in the issuing of a warrant.

“Such officers cannot be coerced as regards acts involving judgment or discretion. Thus when the officer has a discretion in the allowance or rejection of claims presented and exercises it, his determination cannot be controlled or reviewed on mandamus, though he may be required in the first instance to take initial action, as his determination as to whether the claim shall be allowed or rejected involves the judicial function. The writ will be denied if the performance of the act sought to be enforced is not clearly imposed upon the officer, as an official duty, or if the right to have the act performed is not clearly established, as where it is sought to compel the officer to draw a warrant in favor of the relator.” 18 R. C. L. 192.

The application of the general rule that mandamus against state auditors will be denied when the issuance of warrants is discretionary, is fully borne out by the numerous cases cited in the note to the case of *Cook v. Iverson*, 52 L. R. A. (NS) 415, at

pp. 440, 441; also in the note to the case of *Ward v. Commissioners of Beaufort County*, 125 Am. Stat. Rep. 489, at p. 520.

In the case of *State ex rel. Davey v. Cheetham*, 20 Wash. 64, it was held that mandamus would not lie to compel the State Auditor to issue a warrant under an appropriation for the benefit of certain claims arising out of the construction of a normal school building to a person designated in the appropriation act where the Auditor was directed to examine and allow unpaid claims and he made such examination and disallowed the claim.

The federal court cannot by mandamus compel a state official to perform even a clearly ministerial act involving no exercise of discretion, unless the law makes it the duty of such official to perform such act. *King v. Davis*, 137 Fed. 222. The general rule that federal courts will not interfere by mandamus to control officers in the discharge of their duties where such acts involve the exercise of judgment or discretion has been repeatedly sustained by the supreme court of the United States, from the early case of *McIntire v. Wood*, 7 Cranch. 504, 3 L. Ed. 420. See 5 Fed. Stat. Ann. 2nd Ed. 947, for citations of numerous cases.

The general rule relative to the issuance of writs of mandamus by the federal district courts is stated

in Foster's Federal Practice, 6th Ed. p. 2261, as follows:

"Except when specifically authorized by statute a District Court of the United States has no power to issue a writ of mandamus which is not necessary for, or ancillary to, the exercise of its jurisdiction in another matter; even when the relief sought concerns a right secured by the Constitution of the United States."

Respondent in error demurred to relator in error's petition for writ of mandamus, and such demurrer was sustained by the district court. The respondent in error has not filed an answer to the writ and the question on the merits has never been considered by the court. Under the rules of practice of the district court in law actions, when a demurrer to a complaint is overruled, the party demurring shall have as of course ten days after service of written notice of the overruling of the demurrer in which to answer, and if this court should reverse the district court respondent in error should not be foreclosed from an opportunity to answer and have the issues heard on the merits.

Having shown that this action is an action against the state and therefore not within the jurisdiction of the district court, that it is not ancillary to the former suit of *Clifford v. Miller, supra*; that the state auditor has discretion in the issuance of warrants, and that the court will not by mandamus attempt to con-

trol such discretion, we respectfully submit that the decision of the district court should be affirmed.

JOHN H. DUNBAR,
Attorney General of the State of Washington,

M. H. WIGHT,
Assistant Attorney General of the State of Washington,
Attorneys for Defendant and Respondent in Error.

H. C. BRODIE,
GUIE & HALVERSTADT,
Of Counsel.

United States
Circuit Court of Appeals
For the Ninth Circuit.

ANTHONY CARNEY,

Plaintiff in Error,

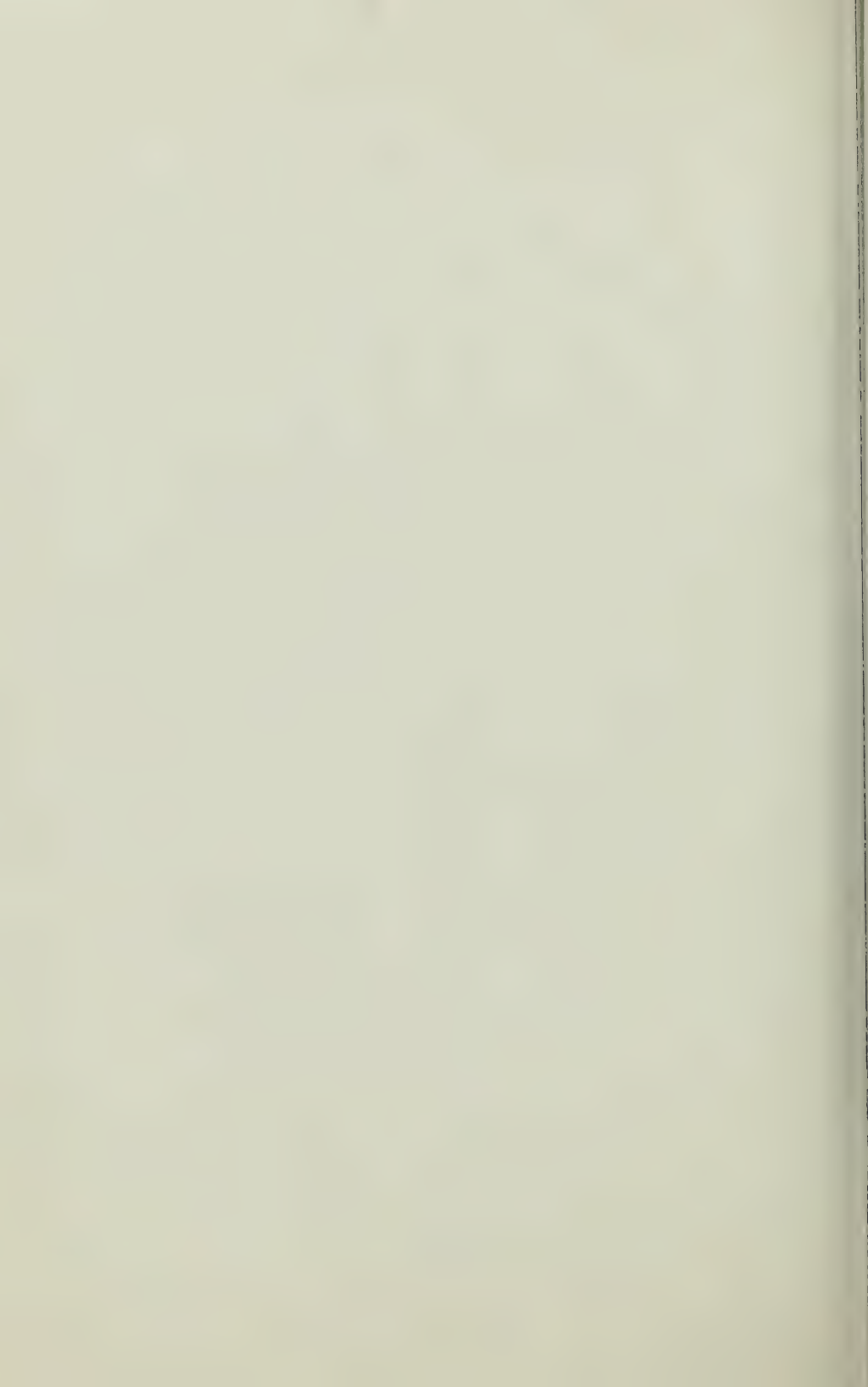
vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Montana.



United States
Circuit Court of Appeals
For the Ninth Circuit.

ANTHONY CARNEY,

Plaintiff in Error,

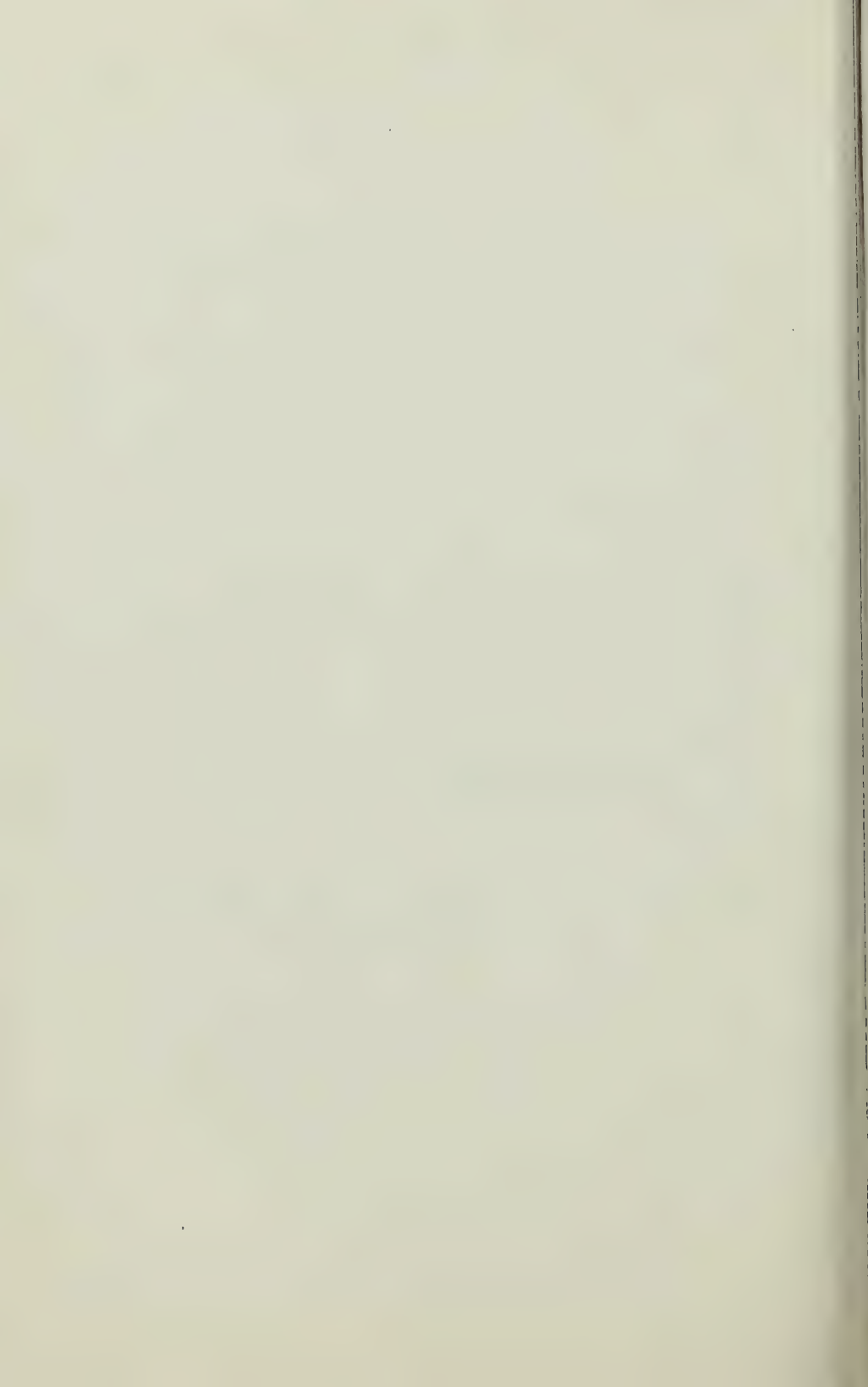
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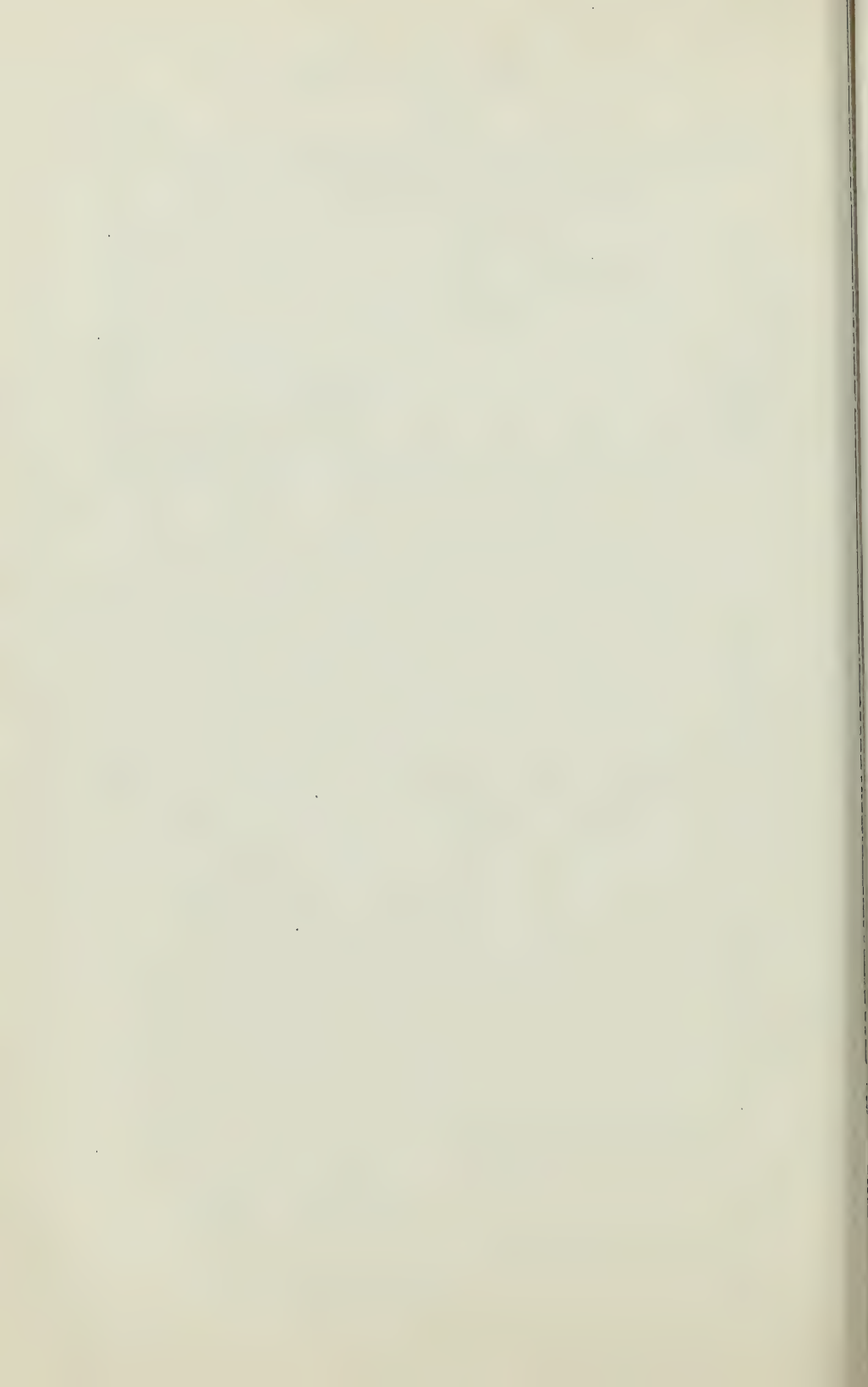
[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

BURTON K. WHEELER, Butte, Montana,

JAMES H. BALDWIN, Butte, Montana,

Attorneys for Plaintiff in Error.

JOHN L. SLATTERY, United States District
Attorney,

RONALD HIGGINS, Asst. United States District
Attorney,

W. H. MEIGS, Assistant United States District
Attorney,

Attorneys for Defendant in Error. [1*]

In the District Court of the United States in and
for the District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTHONY CARNEY,

Defendant.

Be it remembered that on the 26th day of May,
1922, an information was filed herein, which infor-
mation is in the words and figures as follows, to
wit: [2]

*Page-number appearing at foot of page of original certified Tran-
script of Record.

In the District Court of the United States, District
of Montana, Butte Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTHONY CARNEY,

Defendant.

Information.

BE IT REMEMBERED, that John L. Slattery, United States Attorney for the District of Montana, who, for the said United States, in its behalf, prosecutes in his own person, comes here into the District Court of the United States for the District of Montana, on the 26th day of May, 1922, in the February, 1922, term of said court, held at the city of Butte, in the State and District of Montana, and for the United States of America gives the Court to understand and be informed:

That on or about the 18th day of April, 1922, one Anthony Carney, whose true name is to the informant unknown, at and within certain premises situated at 205 W. Quartz St., in the city of Butte, in the county of Silver Bow, in the State and District of Montana, and within the jurisdiction of this court, did then and there wrongfully and unlawfully manufacture intoxicating liquor, to wit, moonshine whiskey, the exact character and quantity of which is to the informant unknown, without then and there first obtaining a permit from the Commissioner of Internal Revenue so to do; contrary

to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America.

SECOND COUNT.

And the informant aforesaid further gives the Court to [3] understand and be informed:

That on or about the 18th day of April, 1922, said Anthony Carney, whose true name is to the informant unknown, at and within certain premises situated at 205 W. Quartz St., in the city of Butte, in the county of Silver Bow, in the State and District of Montana, and within the jurisdiction of this court, did then and there wrongfully and unlawfully manufacture intoxicating liquor, to wit, moonshine whiskey, the exact character and quantity of which is to the informant unknown, without making at the time a permanent record of such manufacture, showing in detail the amount and kind of liquor manufactured and the time and place of manufacture; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America.

THIRD COUNT.

And the informant aforesaid further gives the Court to understand and be informed:

That on or about the 18th day of April, 1922, said Anthony Carney, whose true name is to the informant unknown at and with certain premises situated at 205 W. Quartz St., in the city of Butte, in the county of Silver Bow, in the State and District of Montana, and within the jurisdiction of this court, did then and there wrongfully and unlawfully

have and possess intoxicating liquor intended for use in violation of Title II of the National Prohibition Act; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America.

FOURTH COUNT.

And the informant aforesaid further gives the Court to understand and be informed:

That on or about the 18th day of April, 1922, said Anthony Carney, whose true name is to the informant unknown, at [4] and with certain premises situated at 205 W. Quartz St., in the city of Butte, in the county of Silver Bow, in the State and District of Montana, and within the jurisdiction of this court, did then and there wrongfully and unlawfully have and possess property designed for the manufacture of intoxicating liquor, intended for use in violation of Title II of the National Prohibition Act; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America.

FIFTH COUNT.

And the informant aforesaid further gives the Court to understand and be informed:

That on or about the 18th day of April, 1922, said Anthony Carney, whose true name is to the informant unknown, at and within certain premises situated at 205 W. Quartz St., in the city of Butte, in the county of Silver Bow, in the State and District of Montana, and within the jurisdiction of this Court, did then and there wrongfully and unlawfully maintain a common nuisance, that is to

say, a place and building where intoxicating liquor was kept and manufactured in violation of Title II of the National Prohibition Act; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America.

JOHN L. SLATTERY,
United States Attorney, District of Montana. [5]
United States of America,
District of Montana,—ss.

John L. Slattery, being first duly sworn, on oath, deposes and says:

That he is the duly appointed, qualified and acting United States Attorney for the District of Montana, and as such makes this verification to the foregoing information; that he has read such information, and knows the contents thereof, and that the matters and things stated are true to the best of his knowledge, information and belief.

JOHN L. SLATTERY.

Subscribed and sworn to before me this 25th day of May, 1922.

L. R. POLGLASE,
Deputy Clerk, United States District Court, District of Montana.

Filed May 26, 1922. C. R. Garlow, Clerk.

And thereafter on May 26, 1922, the affidavits of Charles Rodda and Sam Fairchild were filed herein, which is entered of record as follows, to wit: [6]

In the District Court of the United States in and for the District of Montana.

Butte, Montana, April 29, 1922.

UNITED STATES

vs.

ANTHONY CARNEY.

Affidavits of Chas. Rodda and Sam Fairchild.

Chas. Rodda and Sam Fairchild, being first duly sworn according to law, depose and say:

That they are duly appointed, qualified and acting police officers of the city of Butte, Montana, and were such on the 18th day of April, 1922.

That during day of April 18, 1922, man known to them as Fred Bolton, and employed by the Montana Gas Co. came to them and complained that at certain premises, 205 W. Quartz St., Butte, Montana, he was refused admission to premises, for the purpose of reading gas meter.

That they went with man to premises 205 W. Quartz St., and upon entering noticed a very strong odor of mash, that upon investigation they discovered 75 gallon mash, in a state of fermentation, a quantity of white moonshine whiskey, one 12 gallon still and connections.

That they then arrested Anthony Carney, and brought him to Police Station. Anthony Carney

being owner of premises, occupying same, and having full control of same.

Sample of mash and whiskey turned over to the Federal Prohibition Department at Butte, Mont., together with still and connections.

CHARLES RODDA.

SAM FAIRCHILD.

Subscribed and sworn to before me this 9th day of May, 1922.

F. J. DALLMAN,

Deputy Collector of Internal Revenue.

Filed May 26, 1922. C. R. Garlow, Clerk. [7]

In the District Court of the United States in and for the District of Montana.

United States of America,
District of Montana,—ss.

AFFIDAVIT.

Charles Rodda and Sam Fairchild, after each being first duly sworn, upon his oath, according to law, deposes and says as follows, to wit:

That they are duly appointed, qualified and acting police officers of the city of Butte, Montana, and were such on the 18th day of April, 1922;

That while engaged in the dispatch of their official duties they were at those premises situated at 205 West Quartz Street, in the city of Butte, and found therein a 12 gallon still, together with the equipment used in connection with the operation of the same, set up and in operation, and also

found Anthony Carney in charge of the said premises engaged in the operation of the said still, and in the manufacture of intoxicating liquors.

CHARLES RODDA.

SAM FAIRCHILD.

Subscribed and sworn to before me this 24th day of May, 1922, Butte, Montana.

F. J. DALLMAN,

Deputy Collector U. S. I. R. S.

Filed May 26, 1922. C. R. Garlow, Clerk.

And thereafter on May 26th, 1922, an order was entered herein, which order is of record as follows, to wit: [8]

In the District Court of the United States in and for the District of Montana.

No. 921.

UNITED STATES

vs.

ANTHONY CARNEY.

**Order Granting Leave to File Information and
Affidavit.**

On motion of the District Attorney, information and affidavit in support thereof ordered filed herein. The case belonging to the Butte Division, and defendant now on bond, it is ordered that he appear for arraignment at Butte, Montana, on May 29th, 1922, at 9:30 A. M.

Entered in open court May 26, 1922.

C. R. GARLOW,
Clerk.

And thereafter on May 29, 1922, the minute entry on the arraignment of the defendant was entered herein, which entry is of record as follows, to wit:
[9]

In the District Court of the United States in and
for the District of Montana.

No. 921.

UNITED STATES

vs.

ANTHONY CARNEY.

Arraignment.

Defendant present in court and being arraigned, he answered that his true name is Anthony Carney. Thereupon B. K. Wheeler, Esq., asked that the names of Wheeler & Baldwin be entered as attorneys for defendant and it was so ordered. Thereupon defendant waived the reading of the information and entered a plea of not guilty.

Entered in open court May 29, 1922.

C. R. GARLOW,
Clerk.

And thereafter on May 15, 1923, the verdict of the jury was entered herein, which verdict is of record as follows, to wit: [10]

In the District Court of the United States in and
for the District of Montana.

Butte Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTHONY CARNEY,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find the defendant guilty in manner and form as charged in the information on file herein, as to Counts Three, Four and Five, and not guilty as to Counts One and Two.

HENRY WILLIAMS,

Foreman.

Filed May 15, 1923. C. R. Garlow, Clerk.

And thereafter on May 15, 1923, the record of trial of the defendant was entered herein, which record of trial is of record as follows, to wit: [11]

In the District Court of the United States in and
for the District of Montana.

No. 921.

UNITED STATES

vs.

ANTHONY CARNEY.

Trial.

This cause came on regularly for trial this day, defendant being present with his attorney, J. H. Baldwin, Esq., and John L. Slattery, Esq., United States Attorney, appearing for the United States. Thereupon the following were duly impaneled, accepted and sworn as a jury to try the cause, viz.: J. W. Pyle, Jerry Shea, T. C. Hall, P. M. Joslin, Henry Williams, John T. Neal, Swend Carlson, A. C. Richie, Robert Quackenbush, Charles A. Hauswirth, John Thoney and A. F. Waldorf. Thereupon Fred Bolton, Charles Rodda and Sam Fairchild were sworn and examined as witnesses for the United States, and a certain still and jug of moonshine introduced, whereupon the United States rested. Thereupon defendant moved the Court to direct the jury to return a verdict of not guilty herein, for lack of proof, which motion was denied and exception of defendant noted. Thereupon Mrs. A. Carney, Mrs. Gannon, William Colmer, Martin Walsh, Joe Nevin and Anthony Carney, were sworn and examined as witnesses for defendant, and Charles Rodda recalled as a witness by defendant,

whereupon defendant rested. Thereupon Charles Rodda was recalled in rebuttal by plaintiff, whereupon plaintiff rested and the evidence closed. Thereupon, after the arguments of counsel and the instructions of the Court, the jury retired to consider of its verdict, the marshal being directed to furnish meals and lodging to the jurors engaged in the trial of said cause and to the two bailiffs in charge of said jury. Thereafter the jury returned into court with its verdict, which verdict was received by the Court, and ordered read and filed, and by the jury acknowledged [12] to be its true verdict, being as follows, to wit: "We, the jury in the above-entitled cause, find the defendant guilty in manner and form as charged in the information on file herein, as to counts Three, Four and Five, and not guilty as to counts One and Two. Henry Williams, Foreman." Thereupon Court ordered that time for sentence be continued until 9:30 A. M. tomorrow.

Entered in open court May 15, 1923.

C. R. GARLOW,
Clerk.

And thereafter on May 16, 1923, judgment was rendered and entered herein, which judgment is of record as follows, to wit: [13]

In the District Court of the United States in and
for the District of Montana.

No. 921.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANTHONY CARNEY,
Defendant.

Judgment.

The United States Attorney with the defendant and his counsel present in court.

The defendant was thereupon duly informed by the Court of the nature of the charge against him as appears in Counts 3, 4 and 5 of the information herein, and of his arraignment, and plea of not guilty, and of his trial and the verdict of the jury of guilty as to counts 3, 4 and 5 of the information.

And the defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing to the Court, thereupon the Court rendered its judgment as follows, to wit:

That whereas the said defendant having been convicted in this court of the offense of unlawfully having and possessing intoxicating liquor and property designed for the manufacture of intoxicating liquor, intended for use in violation of the National Prohibition Act, and unlawfully maintaining a

common nuisance, in violation of the National Prohibition Act, committed on the 18th day of April, 1922, at Butte, in the State and District of Montana, as charged in counts 3, 4 and 5 of the information herein;

It is therefore considered, ordered, and adjudged that for said offense you, the said Anthony Carney be confined and imprisoned in [14] the county jail at Butte, Montana, for the term of seven months and that you pay a fine of Two Hundred and Fifty Dollars and costs taxed at \$39.70, and that you be confined in said county jail until said fine is paid or you are otherwise discharged according to law. Thereupon, for good cause, Court ordered that commitment herein be stayed for 24 hours, pending the filing of a motion by defendant for a new trial.

Judgment rendered and entered May 16th, 1923.

[Seal]

C. R. GARLOW,

Clerk.

By H. H. Walker,

Deputy.

And thereafter on May 17, 1923, motion for new trial was filed herein, which motion for new trial is of record as follows, to wit: [15]

In the District Court of the United States for the
District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTHONY CARNEY,

Defendant.

Motion for New Trial.

Comes now the defendant in the above-entitled
action and moves as follows:

I.

That the verdict of guilty on the third count contained in the information on file herein on May 15, 1923, be set aside and a new trial on said count of the information allowed on the grounds and for the reasons following:

1. That the charge contained in said count of said information does not state facts sufficient to constitute a public offense.

2. That the facts stated in said count of said information are not sufficient to show a violation of any criminal law of the United States of America.

3. That said third count of said information does not include any defensive negative averments or supply the want thereof by stating "that the act complained of was then and there prohibited and unlawful" as required by Section 32 of the National Prohibition Act.

4. That because the charge contained in said count of said information does not state facts suffi-

cient to constitute a public offense, the above-entitled court was and is without jurisdiction [16] to try the defendant on the charge contained in said count of said information.

5. That because the facts stated in said count of said information are not sufficient to show a violation of any criminal law of the United States of America, the above-entitled court was and is without jurisdiction to try the defendant on the charge contained in said count of said information.

6. That because of the fact that said third count of said information does not include any defensive negative averments or supply the want thereof by stating "that the act complained of was then and there prohibited and unlawful" as required by Section 32 of the National Prohibition Act, the above-entitled court was and is without jurisdiction to try the defendant on the charge contained in said count of said information.

7. Errors in law occurring at the trial as follows:

The Court erred in overruling defendant's objections to the testimony given by the witness Van Orden relating to conversations had by him with the defendant's wife in the absence of the defendant.

The Court erred in overruling defendant's objections to the testimony given by the witness Fairchild relating to conversations had by him with defendant's wife in the absence of the defendant.

The Court erred in admitting the testimony of the witness Van Orden concerning statements to

have been made by the defendant's wife concerning the necessity for and want of a search-warrant as the basis for searching the premises mentioned and described in the information herein.

The Court erred in denying defendant's motion for a directed verdict made at the conclusion of the Government's case.

The Court erred in making the comment that it did make in overruling defendant's motion for a directed verdict at the conclusion of the Government's case. [17]

The Court erred in submitting the charge contained in said count of said information to the jury.

8. While charging the jury, the Court erred as follows:

In its definition of a reasonable doubt.

In its statement of the law relating to the presumption of innocence.

In failing to tell the jury that the presumption of innocence is an instrument of proof created by law in favor of one accused of crime whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has thus created.

That this presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn.

That this legal presumption of innocence is to be regarded by the jury in every case as matter of evi-

dence to the benefit of which the party charged with crime is entitled.

That the presumption of innocence is evidence in favor of the accused which must be borne in mind by the jury and considered by them with all of the other evidence in the case in arriving at their verdict.

That the jury is bound to find according to the presumption of innocence unless after considering all of the evidence in the case together with that presumption, they are satisfied beyond a reasonable doubt that the defendant is guilty as charged.

In charging that the presumption of innocence is merely a status created by law at the commencement of the trial.

That in failing to charge the jury that to overturn the presumption of innocence, there must be evidence of guilt carrying home a degree of conviction short only of absolute certainty. [18]

In stating that a statement said to have been made by the defendant's wife in his absence, concerning the necessity of a search-warrant authorizing the searching of the premises as described in the information herein, was an admission of guilty knowledge, from which the jury might infer that the defendant knew of, participated in, and was a party to the crime charged in said count of said information.

In stating that the evidence was such as to require the inference that the defendant was a partner with Joe O'Donnell in connection with the matters charged in said count of said information.

In stating that the evidence justified the inference that the defendant was a partner with Joe O'Donnell in connection with the matters charged in said count of said information.

That in stating that the jury had a perfect right to infer from the evidence that the defendant and Joe O'Donnell were partners in connection with the matters charged in said count of said information.

In stating that the defendant testified that he did not know anything about the search of the premises described in the information until he was told about it by the officers at the time they arrested him.

In arguing that because thereof the jury should view the testimony of the defendant with suspicion.

In using the word "bamboozled" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were trying to deceive and impose upon the jury and to practice trickery and deception and had been guilty of perjury, and to cause the jury in arriving at [19] their verdict in the case, to act upon the theory that defendant's witnesses were trying to deceive and impose upon the jury and to practice trickery and deception and had been guilty of perjury and were not worthy of any credit whatsoever.

In using the word "hoodwinked" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were trying to deceive the jury as if by blinding, to blindfold the jury and to cover and conceal the true facts from the jury and had been guilty of perjury, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were trying to deceive the jury as if by blinding, to blindfold the jury and to cover and conceal the true facts from the jury and had been guilty of perjury, and were not worthy of any credit whatsoever.

In using the word "gulled" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were endeavoring to treat the members of the jury as simple, credulous persons, easily tricked, and to make them the victims of trickery and deceit practiced by defendant's witnesses upon them, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were endeavoring to treat the members of the jury as simple, credulous persons, easily tricked,

and to make them the victims of trickery and deceit practiced by defendant's witnesses upon them, and were not worthy of any credit whatsoever.

In failing to state definitely the elements essential [20] to the commission of the crime charged to have been committed in the third count of the information.

In failing to state that each of these elements must be proved to the satisfaction of the jury beyond a reasonable doubt before the defendant could be legally convicted of the crime charged in the third count of the information.

In failing to state to the jury what the Government was required to prove beyond a reasonable doubt before a verdict finding the defendant guilty on the charge contained in the third count of the information would be justified.

In charging generally on all of the counts contained in the information herein and definitely on none.

In submitting the charge contained in the third count of the information and the charge contained in the fifth count of the information for the reason that as a result thereof defendant was twice put in jeopardy for the same offense.

In failing to instruct the jury:

That circumstantial evidence should be acted upon with caution.

That before a conviction can properly be had on circumstantial evidence, all the essential facts must be consistent with the hypothesis of guilt as that is to be compared with all the facts proved.

That the facts must exclude every other theory but that of guilt and that the facts must establish such a certainty of guilt of the accused as to convince the judgment beyond a reasonable doubt that the accused is the one who committed the offense.

In failing to instruct the jury that where a conviction is sought solely upon circumstantial evidence, the criminatory circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis.

In commenting as it did concerning the weight and effect to be given to the testimony of the defendant himself. [21]

9. That the evidence is insufficient to justify the verdict of guilty on said count of said information for this:

That there is nothing in the evidence showing or tending to show to whom the liquor said to have been found in the premises described in the information herein, belonged.

That there is nothing in the evidence tending to show that the liquor mentioned in said count of said information belonged to the defendant.

That there is nothing in the evidence tending to show, how, when or by whom the liquor mentioned in said count of said information was put in the place where it is stated to have been found.

That there is nothing in the evidence tending to show that the defendant in this case was ever the owner of, in possession of, or in control of said

liquor, or that he had any knowledge concerning its existence, or the place where it was kept.

That there is nothing in the evidence tending to show that if the liquor mentioned in said count of said information belonged to the defendant, he was not legally permitted to possess the same,

That unless it be conceded that the testimony given on the part of the defendant to the effect that the room in which the liquor mentioned in said count of said information was found, is true, and that the room in which said liquor is stated to have been found, had been rented to a person other than the defendant, there is nothing in the evidence tending to show that said liquor was not kept in defendant's private dwelling for the personal consumption of the defendant and his family residing in such dwelling and to his *bona fide* guests when entertained by him therein.

That if it be conceded that the testimony given on the part of the defendant to the effect that the room in which the liquor mentioned in said count of said information was found is true, and that the room in which said liquor is stated to have been found, had been rented to a person other than the defendant, there is nothing [22] in the evidence tending to show that the defendant had any knowledge of, title to, or control over such liquor.

That there is nothing in the evidence tending to show that the liquor mentioned in the third count of said information and stated to have been intended for use in violation of Title II of the National Prohibition Act was kept in the premises

mentioned in said information for sale, barter or any other commercial purpose.

That there is nothing in the evidence tending to show that any intoxicating liquor had ever been sold, bartered or used for any commercial purpose in or on the premises described in the information herein or by the defendant at any time or place.

II.

That the verdict of guilty on the fourth count contained in the information on file herein on May 15, 1923, be set aside and a new trial on said count of the information allowed on the grounds and for the reasons following:

1. That the charge contained in said count of said information does not state facts sufficient to constitute a public offense.

2. That the facts stated in said count of said information are not sufficient to show a violation of any criminal law of the United States of America.

3. That because of the charge contained in said count of said information does not state facts sufficient to constitute a public offense, the above-entitled court was and is without jurisdiction to try the defendant on the charge contained in said count of said information.

4. That because the facts stated in said count of said information are not sufficient to show a violation of any criminal law of the United States of America, the above-entitled court was and is without jurisdiction to try the defendant on the charge contained in said count of said information. [23]

7. Errors in law occurring at the trial as follows:

The Court erred in overruling defendant's objections to the testimony given by the witness Van Orden relating to conversations had by him with the defendant's wife in the absence of the defendant.

The Court erred in overruling defendant's objections to the testimony given by the witness Fairchild relating to conversations had by him with defendant's wife in the absence of the defendant.

The Court erred in admitting the testimony of the witness Van Orden concerning statements to have been made by the defendant's wife concerning the necessity for and want of a search-warrant as the basis for searching the premises mentioned and described in the information herein.

The Court erred in denying defendant's motion for a directed verdict made at the conclusion of the Government's case.

The Court erred in making the comment it did make in overruling defendant's motion for a directed verdict made at the conclusion of the Government's case.

The Court erred in submitting the charge contained in said count of said information to the jury.

8. While charging the jury, the Court erred as follows:

In its definition of a reasonable doubt.

In its statement of the law relating to the presumption of innocence.

In failing to tell the jury that the presumption of innocence is an instrument of proof created by law in favor of one accused of crime whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has thus created.

That this presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion [24] of his guilt or innocence is to be drawn.

That this legal presumption of innocence is to be regarded by the jury in every case as matter of evidence to the benefit of which the party charged with crime is entitled.

That the presumption of innocence is evidenced in favor of the accused which must be borne in mind by the jury and considered by them with all of the other evidence in the case in arriving at their verdict.

That the jury is bound to find according to the presumption of innocence unless after considering all of the evidence in the case together with that presumption, they are satisfied beyond a reasonable doubt that the defendant is guilty as charged.

In charging that the presumption of innocence is merely a status created by law at the commencement of the trial.

That in failing to charge the jury that to overturn the presumption of innocence, there must be evidence of guilt carrying home a degree of conviction short only of absolute certainty.

In stating that a statement said to have been made by the defendant's wife in his absence, concerning the necessity of a search-warrant authorizing the searching of the premises described in the information herein, was an admission of guilty knowledge, from which the jury might infer that the defendant knew of, participated in, and was a party to the crime charged in said count of said information.

In stating that the evidence was such as to require that the defendant was a partner with Joe O'Donnell in connection with the matters charged in said count of said information.

In stating that the evidence justified the inference that the defendant was a partner with Joe O'Donnell in connection with the matter charged in said count of said information.

That in stating that the jury had a perfect right to infer from the evidence, that the defendant and Joe O'Donnell were [25] partners in connection with the matters charged in said count of said information.

In stating that the defendant testified that he did not know anything about the search of the premises described in the information until he was told about it by the officers at the time they arrested him.

In arguing that because thereof the jury should view the testimony of the defendant with suspicion.

In using the word "bamboozled" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason

that the way in which the word was used and the connection in which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were trying to deceive and impose upon the jury and to practice trickery and deception and had been guilty of perjury, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were trying to deceive and impose upon the jury and to practice trickery and deception and had been guilty of perjury and were not worthy of any credit whatsoever.

In using the word "hoodwinked" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were trying to deceive the jury as if by blinding, to blindfold the jury and to cover and conceal the true facts from the jury and had been guilty of perjury, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were trying to deceive the jury as if by blinding, to blindfold the jury and to cover and conceal the true [26] facts from the jury and had been guilty of perjury, and were not worthy of any credit whatsoever.

In using the word "gulled" in connection with its comment concerning the testimony given by the

witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were endeavoring to treat the members of the jury as simple, credulous persons, easily tricked, and to make them victims of trickery and deceit practiced by defendant's witnesses upon them, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were endeavoring to treat the members of the jury as simple, credulous persons, easily tricked, and to make them the victims of trickery and deceit practiced by defendant's witnesses upon them, and were not worthy of any credit whatsoever.

In failing to state definitely the elements essential to the commission of the crime charged to have been committed in the fourth count of the information.

In failing to state that each of these elements must be proved to the satisfaction of the jury beyond a reasonable doubt before the defendant could be legally convicted of the crime charged in the fourth count of the information.

In failing to state to the jury what the Government was required to prove beyond a reasonable doubt before a verdict finding the defendant guilty on the charge contained in the fourth count of the information would be justified.

In charging generally on all of the counts con-

tained in the information herein and definitely on none.

In failing to instruct the jury:

That circumstantial evidence should be acted upon with caution.

That before a conviction can properly be had on circumstantial [27] evidence, all the essential facts must be consistent with the hypothesis of guilt as that is to be compared with all the facts proved.

That the facts must exclude every other theory but that of guilt and that the facts must establish such a certainty of guilt of the accused as to convince the judgment beyond a reasonable doubt that the accused is the one who committed the offense.

In failing to instruct the jury that where a conviction is sought solely upon circumstantial evidence, the criminatory circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis.

In commenting as it did concerning the weight and effect to be given to the testimony of the defendant himself.

9. That the evidence is insufficient to justify the verdict of guilty on said count of said information for this:

That there is nothing in the evidence showing or tending to show to whom the property, stated in said count of the information, to be designed for the manufacture of intoxicating liquor intended for

use in violation of Title II of the National Prohibition Act, belonged.

That there is nothing in the evidence tending to show that the property mentioned in said count of said information belonged to the defendant.

That there is nothing in the evidence tending to show how, when or by whom the property mentioned in said count of said information was put in the place where it is stated to have been found.

That there is nothing in the evidence tending to show that the defendant in this case was ever the owner of, in possession of, or in control of said property, or that he had any knowledge concerning its existence, or the place where it was kept. [28]

That it appears from the testimony that the room in which said property is stated to have been found had been rented to a person other than the defendant and there is nothing in the evidence tending to show that the defendant had any knowledge of, title to, or control over such property.

That there is nothing in the evidence tending to show that said property had been used for the manufacture of any intoxicating liquor.

That there is nothing in the evidence tending to show that said property was ever used on the premises described in the information herein for the purpose of manufacturing any intoxicating liquor for sale, barter or any other purpose or otherwise or at all.

That there is nothing in the evidence tending to show that any intoxicating liquor had ever been sold, bartered or used for any commercial purpose

in or on the premises described in the information herein or by the defendant at any time or place.

III.

That the verdict of guilty on the fifth count contained in the information on file herein on May 15, 1923, be set aside and a new trial on said count of the information allowed on the grounds and for the reasons following:

1. That in so far as said count charges the maintenance of a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act is concerned, the charge contained in said count of said information does not state facts sufficient to constitute a public offense.

2. That in so far as said count charges the maintenance of a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act is concerned, the facts stated in said count of said information are not sufficient to show a violation [29] of any criminal law of the United States of America.

3. That in so far as said count charges the maintenance of a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act is concerned, the fifth count of said information does not include any defensive negative averments or supply the want thereof by stating "that the act complained of was then and there prohibited

and unlawful” as required by Section 32 of the National Prohibition Act.

4. That because in so far as said count charges the maintenance of a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act, the same does not include any defensive negative averments or supply the want thereof by stating “that the act complained of was then and there prohibited and unlawful” as required by Section 32 of the National Prohibition Act, the above-entitled court was and is without jurisdiction to try the defendant on the charge contained in said count of said information, that he maintained a nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act.

5. That in so far as said count charges the maintenance of a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act is concerned, by their verdict of not guilty on the first and second counts contained in said information, the jury found the issue framed by defendant’s plea of not guilty to the charge last mentioned in favor of the defendant, and the Government is now foreclosed from contending that the defendant was guilty of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor [30] was man-

ufactured in violation of Title II of the National Prohibition Act.

6. Errors in law occurring at the trial as follows:

The Court erred in overruling defendant's objection to the testimony given by the witness Van Orden relating to conversations had by him with the defendant's wife in the absence of the defendant.

The Court erred in overruling defendant's objection to the testimony given by the witness Fairchild relating to conversations had by him with defendant's wife in the absence of the defendant.

The Court erred in admitting the testimony of the witness Van Orden concerning statements having been made by the defendant's wife concerning the necessity for and want of search-warrant as the basis for searching the premises mentioned and described in the information herein.

The Court erred in denying defendant's motion for a directed verdict made at the conclusion of the Government's case.

The Court erred in making the comment that it did make in overruling defendant's motion for a directed verdict made at the conclusion of the Government's case.

The Court erred in submitting either of the charges contained in said count of said information to the jury.

7. While charging the jury the Court erred as follows:

In its definition of a reasonable doubt.

In its statement of the law relating to the presumption of innocence.

In failing to tell the jury that the presumption of innocence is an instrument of proof created by law in favor of one accused of crime whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has thus created. [31]

That this presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn.

That this legal presumption of innocence is to be regarded by the jury in every case as matter of evidence to the benefit of which the party charged with crime is entitled.

That the presumption of innocence is evidence in favor of the accused which must be borne in mind by the jury and considered by them with all of the other evidence in the case in arriving at their verdict.

That the jury is bound to find according to the presumption of innocence unless after considering all of the evidence in the case together with that presumption, they are satisfied beyond a reasonable doubt that the defendant is guilty as charged.

In charging that the presumption of innocence is merely a status created by law at the commencement of the trial.

That in failing to charge the jury that to overturn the presumption of innocence, there must be

evidence of guilt carrying home a degree of conviction short only of absolute certainty.

In stating that a statement said to have been made by the defendant's wife in his absence, concerning the necessity of a search-warrant authorizing the searching of the premises described in the information herein, was an admission of guilty knowledge, from which the jury might infer that the defendant knew of, participated in, and was a party to the crime charged in said count of said information.

In stating that the evidence was such as to require the inference that the defendant was a partner of Joe O'Donnell in connection with the matters charged in said count of said information. [32]

In stating that the evidence justified the inference that the defendant was a partner with Joe O'Donnell in connection with the matters charged in said count of said information.

That in stating that the jury had a perfect right to infer from the evidence that the defendant and Joe O'Donnell were partners in connection with the matters charged in said count of said information.

In stating that the defendant testified that he did not know anything about the search of the premises described in the information until he was told about it by the officers at the time they arrested him.

In arguing that because thereof the jury should view the testimony of the defendant with suspicion.

In using the word "bamboozled" in connection with its comment concerning the testimony given

by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were trying to deceive and impose upon the jury and to practice trickery and deception and had been guilty of perjury, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were trying to deceive and impose upon the jury and to practice trickery and deception and had been guilty of perjury and were not worthy of any credit whatsoever.

In using the word "hoodwinked" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were trying to deceive the jury as if by blinding, to blindfold the jury and to cover and conceal the true [33] facts from the jury and had been guilty of perjury, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were trying to deceive the jury as if by blinding, to blindfold the jury and to cover and conceal the true facts from the jury and had been guilty of perjury, and were not worthy of any credit whatsoever.

In using the word "gulled" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were endeavoring to treat the members of the jury as simple, credulous persons, easily tricked, and to make them the victims of trickery and deceit practiced by defendant's witnesses upon them, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were endeavoring to treat the members of the jury as simple, credulous persons, easily tricked, and to make them the victims of trickery and deceit practiced by defendant's witnesses upon them, and were not worthy of any credit whatsoever.

In failing to state definitely the elements essential to the commission of the crime of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act.

In failing to state that each of these elements must be proved to the satisfaction of the jury beyond a reasonable doubt before the defendant could be legally convicted of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act.

In failing to state definitely the elements essential to the commission of the crime of maintaining a

common nuisance, [34] that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act.

In failing to state that each of these elements must be proved to the satisfaction of the jury beyond a reasonable doubt before the defendant could be legally convicted of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act.

In failing to state to the jury what the Government was required to prove beyond a reasonable doubt, before a verdict finding the defendant guilty of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act would be justified.

In failing to state to the jury what the Government was required to prove beyond a reasonable doubt, before a verdict finding the defendant guilty of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act would be justified.

In charging generally on all the charges contained in the information herein and definitely on none.

In submitting the charge that defendant was guilty of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II

of the National Prohibition Act, and the charges contained in the first and second counts of said Information to the jury, for the reason that as a result thereof, defendant was twice put in jeopardy for the same offense.

In failing to instruct the jury:

That circumstantial evidence should be acted upon with caution. [35]

That before a conviction can properly be had on circumstantial evidence, all the essential facts must be consistent with the hypothesis of guilt as that is to be compared with all the facts proved.

That the facts must exclude every other theory but that of guilt and that the facts must establish such a certainty of guilt of the accused as to convince the judgment beyond a reasonable doubt that the accused is the one who committed the offense.

In failing to instruct the jury that where a conviction is sought solely upon circumstantial evidence, the criminatory circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis.

In commenting as it did concerning the weight and effect to be given to the testimony of the defendant himself.

8. That the evidence is insufficient to justify a verdict of guilty on the charge that defendant maintained a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act for this:

That there is nothing in the evidence showing or tending to show to whom the liquor said to have been found in the premises described in the Information herein, belonged.

That there is nothing in the evidence tending to show that the liquor mentioned in said count of said Information belonged to the defendant.

That there is nothing in the evidence tending to show how, when or by whom the liquor mentioned in said count of said information was put in the place where it is stated to have been found.

That there is nothing in the evidence tending to show that the defendant in this case was ever the owner of, in possession [36] of, or in control of said liquor, or that he had any knowledge concerning its existence, or the place where it was kept.

That there is nothing in the evidence tending to show that if the liquor mentioned in said count of said information belonged to the defendant, he was not legally permitted to possess the same.

That unless it be conceded that the testimony given on the part of the defendant to the effect that the room in which the liquor mentioned in said count of said information was found, is true, and that the room in which said liquor is stated to have been found, had been rented to a person other than the defendant, there is nothing in the evidence tending to show that said liquor was not kept in defendant's private dwelling for the personal consumption of the defendant and his family

residing in such dwelling and to his *bona fide* guests when entertained by him therein.

That if it be conceded that the testimony given on the part of the defendant to the effect that the room in which the liquor mentioned in said count of said information was found is true, and that the room in which said liquor is stated to have been found, had been rented to a person other than the defendant, there is nothing in the evidence tending to show that the defendant had any knowledge of, title to, or control over such liquor.

That there is nothing in the evidence tending to show that the liquor mentioned in the fifth count of said information and stated to have been intended for use in violation of Title II of the National Prohibition Act was kept in the premises mentioned in said information for sale, barter, or any other commercial purpose.

That there is nothing in the evidence tending to show that any intoxicating liquor had ever been sold, bartered or used for any commercial purpose in or on the premises described in the information herein or by the defendant at any time or place.

9. That the evidence is insufficient to justify [37] a verdict of guilty on the charge that defendant maintained a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act for this:

That by their verdict of not guilty on the first and second counts contained in the information

herein, the jury found that no liquor had been manufactured at or within the premises mentioned and described in the fifth count of said information.

That there is nothing in the evidence tending to show that any intoxicating liquor was ever manufactured at or within the premises mentioned and described in said count of said information.

That there is nothing in the evidence tending to show to whom any property contained in the premises mentioned in said count of said information which could have been used for manufacturing intoxicating liquor in violation of Title II of the National Prohibition Act belonged.

That there is nothing in the evidence tending to show that any property of any kind stated to have been used in said premises for the purpose of manufacturing intoxicating liquor in violation of Title II of the National Prohibition Act belonged to the defendant.

That there is nothing in the evidence tending to show how, when or by whom any property stated to have been found in the premises described in said count of said information which could have been used for the manufacture of intoxicating liquor in violation of Title II of the National Prohibition Act was put in the place where it is stated to have been found.

That there is nothing in the evidence tending to show that the defendant in this case was the owner of, in possession of, or in control of any property stated to have been found in the prem-

ises described in said count of said information, which could [38] have been used for manufacturing intoxicating liquor in violation of Title II of the National Prohibition Act, or that he had any knowledge concerning its existence or the place where it was kept or the purpose for which it could be used.

That if the evidence proved that the defendant had knowledge or reason to believe that his room, house or building was occupied or used for keeping liquor contrary to any provision of Title II of the National Prohibition Act, and suffered the same to be so occupied or used, such evidence is insufficient to justify the conviction of the defendant on the charge of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act, as charged in the fifth count of the information herein.

That if the evidence proved that the defendant had knowledge or reason to believe that his room, house or building was occupied or used for keeping liquor contrary to any provision of Title II of the National Prohibition Act, and suffered the same to be so occupied or used, such proof would not justify the infliction of any penalty upon or punishment of the defendant other than that the room, house or building so occupied or used should be subject to a lien for and might be sold to pay all fines and costs assessed against the person guilty of maintaining a common nuisance in said room, house or building for such violation, and that any

such lien might be enforced by any court having jurisdiction as provided in the concluding sentence of Section 21 of the National Prohibition Act.

That if the evidence proved that the defendant had knowledge or reason to believe that his room, house or building was occupied or used for the manufacture of liquor contrary to any provision of Title II of the National Prohibition Act, and suffered the same to be occupied or used, such evidence is insufficient to [39] justify the conviction of the defendant on the charge of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act, as charged in the fifth count of the information herein.

That if the evidence proved that the defendant had knowledge or reason to believe that his room, house or building was occupied or used for the manufacture of liquor contrary to any provision of Title II of the National Prohibition Act, and suffered the same to be so occupied or used, such proof would not justify the infliction of any penalty upon or punishment of the defendant other than that the room, house or building so occupied or used should be subject to a lien for and might be sold to pay all fines and costs assessed against the person guilty of maintaining a common nuisance in said room, house or building for such violation, and that any such lien might be enforced by any court having jurisdiction as provided in the con-

cluding sentence of Section 21 of the National Prohibition Act.

10. That it appears from the uncontradicted testimony of the Government's witnesses, Van Orden and Fairchild, that the affidavit made by them and presented to the court by the United States Attorney, at the time he requested leave to file the information in the above-entitled court and cause, which affidavit is the sole basis on which the discretion of the court to grant the request of the United States Attorney for leave to file said information is based, was false and not according to the facts in many material respects, as a result of which:

The United States Attorney was mislead;

The Court was asked to and did exercise its discretion in authorizing the the filing of said information upon an entirely erroneous conception of the facts; and

The defendant was required to plead to and stand trial on an [40] information improperly filed and without proper basis in law.

And upon the true facts appearing, the Court should have annulled its order granting leave to file the information on file in the above-entitled court and cause and dismissed the action.

11. That the statements contained in said affidavit and not shown by the testimony of the Government's witnesses, Van Orden and Fairchild, to have been false, were not sufficient to justify the United States Attorney in requesting leave to file said information or to authorize the Court in the

exercise of its discretion, to have granted such request, as a result of which:

The United States Attorney was mislead;

The Court was asked to and did exercise its discretion in authorizing the filing of said information upon an entirely erroneous conception of the facts; and

The defendant was required to plead to and stand trial on an information improperly filed and without proper basis in law.

Each of these motions is based and will be presented on the records, files and minute entries in the above-entitled court and cause, the minutes of the court therein, and a bill of exceptions to be hereafter prepared, served, settled and filed.

WHEELER & BALDWIN,

Attorneys for Defendant.

Service of the above and foregoing motion for new trial acknowledged and copy thereof received at Butte, Montana, May 17, 1923.

JOHN L. SLATTERY,

United States Attorney for the District of Montana.

Filed May 17, 1923. C. R. Garlow, Clerk. [41]

And thereafter on May 21, 1923, a minute entry on the calling of the motion for a new trial was made herein, which minute entry is of record as follows, to wit:

In the District Court of the United States in and
for the District of Montana.

No. 921.

UNITED STATES

vs.

ANTHONY CARNEY.

Motion for New Trial.

This cause came on regularly for hearing this day upon defendant's motion for a new trial, J. H. Baldwin, Esq., appearing for the defendant, and the District Attorney being present and appearing for the United States. Thereupon, the Court stated that it did not care to hear oral arguments, whereupon defendant filed a written brief and the matter was submitted to the Court and taken under advisement.

Entered in open court May 21, 1923.

C. R. GARLOW,
Clerk.

And thereafter on May 22, 1923, an order was entered herein denying the motion for a new trial, which motion is of record as follows, to wit: [42]

In the District Court of the United States in and
for the District of Montana.

No. 921.

UNITED STATES

vs.

ANTHONY CARNEY.

Order Denying Motion for New Trial.

Herein, Court ordered that the defendant's motion for new trial, heretofore submitted, be and is denied, whereupon James H. Baldwin, Esq., attorney for defendant, then and there excepted to the ruling of the Court, and asked that defendant be granted a stay of ten days for bill of exceptions. Thereupon Court ordered that said defendant be granted a temporary stay of committment until Monday, May 28th, 1923, for the purpose of suing out a writ of error herein and furnishing bond in the sum of \$1000.00 conditioned as usual.

Entered in open court May 22, 1923.

C. R. GARLOW,
Clerk.

And thereafter on May 28, 1923, petition for writ of error was served and filed herein, which petition for writ of error is of record as follows, to wit: [43]

In the District Court of the United States for the
District of Montana.

No. 921.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTHONY CARNEY,

Defendant.

Petition for Writ of Error.

Comes now the defendant, Anthony Carney, and petitions this Court for a Writ of Error herein and says:

That on May 16, 1923, in the above-entitled matter, the above-entitled Court rendered a judgment and pronounced sentence herein against the defendant, by which the defendant was sentenced to be confined and imprisoned in the County Jail at Butte, Montana, for the term of seven months and to pay a fine of Two Hundred Fifty Dollars (\$250.00) and costs taxed at Thirty-nine and 70/100 Dollars (\$39.70), and to be confined in said county jail until said fine is paid, or he was otherwise discharged according to law, for three alleged offenses stated to have been committed on or about the 18th day of April, 1922, by the defendant herein, at and within certain premises situated at 205 West Quartz Street, in the city of Butte, in the county of Silver Bow, in the State and District of Montana, as follows:

1. Wrongfully and unlawfully having and possessing intoxicating liquor intended for use in violation of Title II of the National Prohibition Act;

2. Wrongfully and unlawfully having and possessing property designed for the manufacture of intoxicating liquor intended for use in violation of Title II of the National Prohibition [44] Act, and

3. Wrongfully and unlawfully maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was kept and manufactured, in violation of Title II of the National Prohibition Act;

That in said judgment and the proceedings had prior thereto in said cause, certain errors were committed to the prejudice of this defendant, all of which will more fully appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error from the judgment of the above-entitled Court rendered and pronounced as aforesaid, may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of;

That such writ shall operate as a stay of proceedings under the sentence pronounced as aforesaid upon bail being given according to law and that a transcript of the records, proceedings and papers in this case duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, State of California;

That said judgment and sentence be reversed, set aside and ordered held for naught, and

Such other orders as are fit and proper be made in the premises.

WHEELER & BALDWIN,

Attorneys for Anthony Carney, defendant.

Service of the above and foregoing petition acknowledged and copy thereof received at Butte, Montana, May 28, 1923.

JOHN L. SLATTERY,

United States District Attorney for the District of Montana.

Filed May 28, 1923. C. R. Garlow, Clerk. [45]

And thereafter on May 28, 1923, assignment of errors was served and filed herein, which assignment of errors is of record as follows, to wit:

In the District Court of the United States for the District of Montana.

No. 921.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTHONY CARNEY,

Defendant.

Assignment of Errors.

Comes now Anthony Carney, the defendant in the above-entitled action and hereby makes his assignment of errors upon which he will rely, as follows to wit:

1. The third charge contained in the information on file herein is insufficient in law for this:

That the charge contained in said count does not state facts sufficient to constitute a public offense.

That the facts stated in said count are not sufficient to show a violation of any criminal law of the United States of America.

That said count does not include any defensive negative averments or supply the want thereof by stating "that the act complained of was then and there prohibited and unlawful" as required by Section 32 of the National Prohibition Act.

2. The Court erred in overruling defendant's objection to the testimony given by the witness Fred Bolton concerning statements made by defendant's wife and transactions had in the absence of the defendant, as follows:

Q. Did your duties on that day or on or about the 18th of April last year take you to a residence at 205 West Quartz Street, in the city of Butte? [46]

A. Yes, sir.

Q. Had you ever been in that house before?

A. Never, no sir.

Q. Did you try to gain entrance that day?

A. Yes, sir.

Q. In what manner?

A. I went up to the front door and knocked on the door and a lady came to the door and I said, "I would like to inspect your gas meter—"

Mr. BALDWIN.—Objected to as hearsay.

The COURT.—Overruled.

By Mr. BALDWIN.—We will ask a general objection and exception.

The COURT.—It will be noted.

A. The lady said, "You can't get in now, wait a minute"; so I waited for about twenty minutes I guess and nobody came back so I goes back down to the office to report it to the foreman down there and I happened to run into Mr. Rodda at the police station.

3. The Court erred in overruling defendant's objection to the testimony given by the witness Rodda, relating to conversations had by him with the defendant's wife in the absence of the defendant, as follows:

Q. Do you know who was living in that house that time? A. Mrs. Carney said she owned—

Mr. BALDWIN.—Objected to as hearsay.

The COURT.—Overruled.

Mr. BALDWIN.—Exception.

A. Mrs. Carney said she owns the property, her and her husband.

Q. I will ask you to look at the defendant and state whether or not he is the husband of Mrs. Carney who made that statement to you?

A. He looks like the man, yes, sir.

Q. Mr. Rodda when you went up to the doorway or door in this house on the occasion you testified to was the door open or closed? [47]

A. The door was closed.

Q. What did you do?

A. Knocked on the door.

Q. Who came to the door? A. Mrs. Carney.

Q. Is that the first place in or about that house you saw her? A. Yes, sir.

Mr. BALDWIN.—Objected as unnecessary repetition and not proper rebuttal.

Q. Let me ask you what if anything did she say to you about a search-warrant?

A. She didn't say anything about the search-warrant until after we got the still and mash.

Q. What did she say then?

A. She said, "Have you got a search-warrant, and I said, "No, lady, we got a still."

4. The Court erred in proceeding with the trial after it appeared from the testimony of the witnesses Rodda and Fairchild, on whose affidavit leave to grant the information filed herein, was granted, while testifying as witnesses for the Government, that the affidavit made by them and on which the order granting leave to file the information was based, was false.

5. The Court erred in not withdrawing its leave to file the information filed herein and dismissing the action, when it appeared from the uncontradicted evidence of the witnesses Rodda and Fairchild, while testifying on behalf of the Government, that the statements contained in their affidavit and on which the Court acted in granting leave to file the information herein, were false.

6. That the statements contained in said affidavit and not shown by the testimony of the Government's witnesses, Rodda and Fairchild, to have been false, were not sufficient to justify the United States Attorney in requesting leave to file the information [48] herein or to authorize the Court in the exercise of judicial discretion, to have granted such request, as a result of which, it appears on the face

of the record, that the defendant was improperly arrested and called for trial in violation of the provisions of the Fourth Amendment to the Constitution of the United States of America.

7. The Court erred in denying defendant's motion for a directed verdict made at the conclusion of the Government's case in chief.

8. The court erred in stating in the presence of the jury, at the time defendant's motion for a directed verdict was overruled, that "the evidence is enough to hang a man if he was on trial for murder," the proceedings at that time being as follows:

Mr. SLATTERY.—The Government rests.

Mr. BALDWIN.—We ask at this time if your Honor please for a directed verdict on the grounds there is not sufficient evidence showing the defendant had any personal knowledge of this transaction or was personally present or had control of the particular portion of the premises in which the evidence is said to have been found, the testimony on that point being that the defendant was not present and was arrested at a following date and he said that someone else rented the premises and he had no control over it.

The COURT.—The evidence is enough to hang a man if he was on trial for murder. The motion is denied.

Mr. BALDWIN.—As an exception.

The COURT.—It will be noted.

While charging the jury the Court erred as follows:

9. In its definition of a reasonable doubt.

10. In its statement of the law relating to the presumption of innocence.

11. In failing to tell the jury that the presumption of innocence is an instrument of proof created by law in favor of one [49] accused of crime whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has thus created.

12. That this presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn.

13. That this legal presumption of innocence is to be regarded by the jury in every case as matter of evidence to the benefit of which the party charged with crime is entitled.

14. That the presumption of innocence is evidence in favor of the accused which must be borne in mind by the jury and considered by them with all of the other evidence in the case in arriving at their verdict.

15. That the jury is bound to find according to the presumption of innocence unless after considering all of the evidence in the case together with that presumption, they are satisfied beyond a reasonable doubt that the defendant is guilty as charged.

16. In charging that the presumption of innocence is merely a status created by law at the commencement of the trial.

17. In failing to charge the jury that to overturn the presumption of innocence, there must be

evidence of guilt carrying home a degree of conviction short only of absolute certainty.

18. In stating that a statement said to have been made by the defendant's wife in his absence, concerning the necessity of a search-warrant authorizing the searching of the premises described in the Information herein, was an admission of guilty knowledge, from which the jury might infer that the defendant knew of, participated in, and was a party to the crime charged in said count of said information.

19. In stating that the evidence was such as to require the inference that the defendant was a partner with Joe O'Donnell in [50] connection with the matters charged in the Information herein.

20. In stating that the evidence justified the inference that the defendant was a partner with Joe O'Donnell in connection with the matters charged in said count of said Information.

21. In stating that the jury had a perfect right to infer from the evidence that the defendant and Joe O'Donnell were partners in connection with the matters charged in said count of said Information.

22. In stating that the defendant testified that he did not know anything about the search of the premises described in the Information until he was told about it by the officers at the time they arrested him.

23. In arguing that because thereof the jury should view the testimony of the defendant with suspicion.

24. In using the word "bamboozled" in connection with its comment concerning the testimony.

25. In using the word "hoodwinked" in connection with its comment concerning the testimony.

26. In using the word "gulled" in connection with its comment concerning the testimony.

27. In failing to state definitely the elements essential to the commission of the crime charged to have been committed in the third count of the information.

28. In failing to state that each of these elements must be proved to the satisfaction of the jury beyond a reasonable doubt before the defendant could be legally convicted of the crime charged in the third count of the information.

29. In failing to state to the jury what the Government was required to prove beyond a reasonable doubt before a verdict finding the defendant guilty on the charge contained in the third count of the information would be justified.

30. In failing to state definitely the elements essential [51] to the commission of the crime charged to have been committed in the fourth count of the information.

31. In failing to state that each of these elements must be proved to the satisfaction of the jury beyond a reasonable doubt before the defendant could be legally convicted of the crime charged in the fourth count of the information.

32. In failing to state to the jury what the Government was required to prove beyond a reasonable doubt before a verdict finding the defendant guilty on the charge contained in the fourth count of the information would be justified.

33. In failing to state definitely the elements essential to the commission of the crime charged to have been committed in the fifth count of the information.

34. In failing to state that each of these elements must be proved to the satisfaction of the jury beyond a reasonable doubt before the defendant could be legally convicted of the crime charged in the fifth count of the information.

35. In failing to state to the jury what the Government was required to prove beyond a reasonable doubt before a verdict finding the defendant guilty on the charge contained in the fifth count of the information would be justified.

36. In charging generally on all of the counts contained in the information herein and definitely on none.

While charging the jury the Court erred in failing to instruct:

37. That circumstantial evidence should be acted upon with caution.

38. That before a conviction can properly be had on circumstantial evidence, all the essential facts proved must be consistent with the hypothesis of guilt as that is to be compared with all the facts proved.

39. That the facts must exclude every other theory but that [52] of guilt and that the facts must establish such a certainty of guilt of the accused as to convince the judgment beyond a reasonable doubt that the accused is the one who committed the offense.

40. In failing to instruct the jury that where a conviction is sought solely upon circumstantial evidence, the criminatory circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis.

41. In commenting as it did concerning the weight and effect to be given to the testimony of the defendant himself.

42. That there is no substantial evidence in this case sustaining the charge contained in the third count of the information on file herein.

43. That there is no substantial evidence in this case sustaining the charge contained in the fourth count of the information on file herein.

44. That there is no substantial evidence in this case sustaining the charge contained in the fifth count of the information on file herein in so far as the charge that the defendant maintained a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act, is concerned.

45. That there is no substantial evidence in this case sustaining the charge contained in the fifth count of the information on file herein in so far as the charge that the defendant maintained a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act, is concerned.

46. The Court erred in submitting to the jury for their consideration the charge contained in the third count of the information herein with the

charge contained in the fifth count of said information, in so far as the same relates to maintaining [53] a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act, the effect of such submission being for the same offense to twice put the defendant in jeopardy.

47. The Court erred in rendering judgment and pronouncing sentence against the defendant on the charge contained in the fifth count of the information herein, in so far, as it relates to maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act, after the jury had found the defendant not guilty on the charges contained in the first and second counts of said information.

48. The court erred in rendering judgment and pronouncing sentence against the defendant on the third count contained in the information herein and that portion of the fifth count of said information relating to maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act.

49. The Court erred in rendering judgment and pronouncing sentence on the fourth count of the information contained herein and on that portion of the fifth count of said information relating to maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act.

50. The court erred in failing to render judgment and pronounce sentence separately on each of the counts contained in the information on which judgment was rendered and sentence pronounced against the defendant.

WHEELER & BALDWIN,
Attorneys for Defendant. [54]

Service of the above and foregoing assignment of errors acknowledged and copy thereof received at Butte, Montana, May 28, 1923.

JOHN L. SLATTERY,
United States District Attorney for the District of
Montana.

Filed May 28, 1923. C. R. Garlow, Clerk.

And thereafter on May 28, 1923, the prayer for reversal was served and filed herein, which prayer of reversal is of record as follows, to wit: [55]

In the District Court of the United States for the
District of Montana.

No. 921.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANTHONY CARNEY,
Defendant.

Prayer for Reversal.

Comes now the defendant in the above-entitled action and prays that the judgment rendered and

sentence pronounced therein in the District Court of the United States, in and for the District of Montana, on May 16, 1923, shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, and

That such other and further orders as may be fit and proper in the premises may be made in the above-entitled cause by said Circuit Court of Appeals.

WHEELER & BALDWIN,
Attorneys for Defendant.

Service of the above and foregoing prayer acknowledged and copy thereof received at Butte, Montana, May 28, 1923.

JOHN L. SLATTERY,
United States District Attorney for the District of Montana.

Filed May 28, 1923. C. R. Garlow, Clerk.

And thereafter on May 28, 1923, an order allowing the writ of error was signed and filed herein, which order is of record as follows, to wit: [56]

In the District Court of the United States for the District of Montana.

No. 921.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANTHONY CARNEY,
Defendant.

Order Allowing Writ of Error.

On this 28 day of May, 1923, the defendant, Anthony Carney, by his attorneys, having filed herein and presented to the Court his petition praying that a writ of error from the judgment of the above-entitled court rendered and sentence pronounced in the above-entitled matter on May 16, 1923, may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors complained of in his said petition and specifications of errors filed therewith, and an assignment of errors intended to be urged by him, and praying also that a transcript of the records, proceedings and papers upon which the judgment herein was rendered and sentence pronounced, duly authenticated, may be presented to the United States Circuit Court of Appeals of the Ninth Circuit and that such other and further proceedings may be had as are meet and proper in the premises.

IN CONSIDERATION WHEREOF, the Court hereby allows a writ of error from the judgment of the District Court in the above-entitled matter, and orders that such writ shall operate as a stay of proceedings under the sentence pronounced as aforesaid, upon the defendant giving bond according to law in the sum of One Thousand Dollars (\$1,000.00) and that upon the due [57] execution

and approval of said bond, the same shall act as a supersedeas herein.

BOURQUIN,

Judge of the United States District Court in and for the District of Montana.

Filed May 28, 1923. C. R. Garlow, Clerk.

Service of the above and foregoing order allowing writ of error acknowledged and copy thereof received at Butte, Montana, May 28, 1923.

JOHN L. SLATTERY,

United States District Attorney for the District of Montana.

And thereafter, to wit, on the 28th day of May, 1923, a writ of error was duly issued herein and thereafter on the 28th day of May, 1923, filed herein, being as follows, to wit: [58]

In the District Court of the United States for the District of Montana.

No. 921.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTHONY CARNEY,

Defendant.

Writ of Error.

The President of the United States of America to the Judge of the District Court of the United States for the District of Montana, GREETING:

Because in the record and proceedings and also in

the rendition of a plea which is in the District Court of the United States for the District of Montana, before you, between the United States of America and Anthony Carney, manifest errors have happened to the great damage of Anthony Carney, as by the record herein appears, and it being fit that the errors, if any there have been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf:

YOU ARE HEREBY COMMANDED, if judgment be therein given, that under your seal distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, State of California, together with this writ so that you may have the same at the city of San Francisco within thirty days from the date of this writ, in the said United States Circuit Court of Appeals, to be there and then held that the records and proceedings [59] aforesaid may be inspected and the said United States Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct said errors, if any, and do what is right and according to the laws and customs of the United States of America should be done.

Witness the Honorable WILLIAM H. TAFT, Chief Justice of the United States of America this 28th day of May, 1923, and of the Independence of

the United States of America the one hundred forty-sixth year.

[Seal]

C. R. GARLOW,

Clerk of the District Court of the United States
for the District of Montana.

By L. R. Polglase,
Deputy Clerk.

Service of the above and foregoing writ of error
acknowledged and copy thereof received at Butte,
Montana, May 28th, 1923.

JOHN L. SLATTERY,

United States District Attorney for the District of
Montana.

Answer of the Court to Writ of Error.

The answer of the Honorable, the District Judge
of the United States, District of Montana, to the
foregoing writ.

The record and proceedings whereof mention is
made, with all things touching the same, I certify,
under the seal of said District Court, to the United
States Circuit Court of Appeals, for the Ninth
Circuit, within mentioned, at the day and place
within contained, in a certain schedule to this writ
annexed, as within I am commanded.

By the Court.

[Seal]

C. R. GARLOW,
Clerk.

By L. R. Polglase,
Deputy Clerk. [60]

[Endorsed]: #921. In the District Court of
the United States for the District of Montana.

The United States of America, Plaintiff, vs. Anthony Carney, Defendant. Writ of Error. Filed May 28th, 1923. C. R. Garlow, Clerk. By L. R. Polglase, Deputy Clerk.

And thereafter, to wit, on the 28th day of May, 1923, a citation was duly issued herein, and thereafter on May 28, 1923, filed herein, being as follows, to wit:

In the District Court of the United States for the
District of Montana.

No. 921.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.
ANTHONY CARNEY,
Defendant.

Citation.

United States of America,—ss.

The President of the United States to the United States of America, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the office of the clerk of the District Court of the United States for the District of Montana, wherein Anthony Carney is plaintiff

in error and the United States of America is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected or reversed or a new trial granted and speedy justice should not be done to the parties in that behalf.

Dated at Butte, Montana, May 28, 1923.

BOURQUIN,

United States District Judge for the District of Montana.

Service of the above and foregoing citation acknowledged and copy thereof received at Butte, Montana, May 28th, 1923.

JOHN L. SLATTERY,

United States District Attorney for the District of Montana. [61]

[Endorsed]: #921. In the District Court of the United States for the District of Montana. The United States of America, Plaintiff, vs. Anthony Carney, Defendant. Citation. Filed May 28, 1923. C. R. Garlow, Clerk. By L. R. Polglase, Deputy Clerk.

And thereafter on May 28, 1923, an order allowing the writ of error was entered herein, which order is of record as follows, to wit:

In the District Court of the United States in and
for the District of Montana.

No. 921.

UNITED STATES

vs.

ANTHONY CARNEY.

Order Allowing Writ of Error.

On this 28th day of May, 1923, the defendant, Anthony Carney, by his attorneys, having filed herein and presented to the court his petition praying that a writ of error from the judgment of the above-entitled court rendered and sentence pronounced in the above-entitled matter on May 16, 1923, may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors complained of in his said petition and specifications of errors filed therewith, and an assignment of errors intended to be urged by him, and praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered and sentence pronounced, duly authenticated, may be presented to the United States Circuit Court of Appeals of the Ninth Circuit and that such other and further proceedings may be had as are meet and proper in the premises.

In consideration whereof the Court hereby allows a writ of error from the judgment of the District Court in the above-entitled matter and orders that

such writ shall operate as a stay of proceedings under the sentence pronounced as aforesaid, upon the defendant giving bond according to law in the sum of (\$1,000.00) One Thousand Dollars, and that upon the due execution and approval of said bond, the same shall act as a supersedeas herein.

Entered in open court May 28, 1923.

C. R. GARLOW,
Clerk.

Thereafter on July 6th, 1923, a bill of exceptions was signed, settled and allowed and ordered filed, which bill of exceptions is of record as follows, to wit: [62]

In the District Court of the United States for the
District of Montana.

No. 921.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANTHONY CARNEY,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED that on May 26, 1922, in open court, John L. Slattery, then and there the duly appointed, qualified and acting United States Attorney for the District of Montana, requested leave to file an information in the above-entitled court charging the defendant with violations of the

National Prohibition Act, and in support of such request presented to the court and filed in the above-entitled court and cause affidavits in words and figures as follows: [63]

Butte, Montana, April 29, 1922.

UNITED STATES

vs.

ANTHONY CARNEY.

Chas. Rodda and Sam Fairchild, being first duly sworn according to law depose and say:

That they are the duly appointed, qualified and acting police officers of the city of Butte, Montana, and were such on the 18th day of April, 1922.

That during the day of April 18, 1922, man known to them as Fred Bolton and employed by the Montana Gas Company, came to them and complained that at certain premises, 205 West Quartz Street, Butte, Montana, he was refused admission to premises for the purpose of reading gas meter.

That they went with man to premises 205 West Quartz Street, and upon entering noticed a very strong odor of mash, that upon investigation they discovered 75 gallon mash, in a state of fermentation, a quantity of white moonshine whiskey, one 12 gallon still and connections.

That they then arrested Anthony Carney and brought him to police station. Anthony Carney being owner of premises occupying same and having full control of same.

Sample of mash and whiskey turned over to the Federal Prohibition Department at Butte, Montana, together with still and connections.

CHARLES RODDA.

SAM FAIRCHILD.

Subscribed and sworn to before me this 9th day of May, 1922.

F. J. DALLMAN,

Deputy Collector of Internal Revenue. [64]

United States of America,
District of Montana,—ss.

Charles Rodda and Sam Fairchild after each being first duly sworn upon his oath according to law deposes and says as follows to wit:

That they are duly appointed, qualified and acting police officers of the city of Butte, Montana, and were such on the 18th day of April, 1922;

That while engaged in the dispatch of their official duties, they were at those premises situated at 205 West Quartz Street, in the city of Butte, and found therein a twelve gallon still together with the equipment used in connection with the operation of the same, set up and in operation and also found Anthony Carney in charge of the said premises engaged in the operation of the said still and in the manufacture of intoxicating liquors.

CHARLES RODDA.

SAM FAIRCHILD.

Subscribed and sworn to before me this 24th day of May, 1922, Butte, Montana.

J. F. DALLMAN,

Deputy Collector U. S. I. R. S. [65]

That thereupon the Court granted leave to file said information.

That at the time said request was made and said leave granted, nothing tending to show probable cause or to believe that a violation of the National Prohibition Act as charged in said information had been committed by anyone or that any violation of the National Prohibition Act had been committed by the defendant other than the statements contained in said affidavits, was offered or introduced and no evidence of any kind tending to show probable cause to believe that a violation of the National Prohibition Act as charged in said information had been committed by anyone or that any violation of the National Prohibition Act had been committed by the defendant, Anthony Carney, other than the statements contained in said affidavits, was offered or introduced and in granting leave to file said information, the Court acted solely on proof contained in said affidavits.

That thereafter and on May 29, 1922, at Butte, Montana, the defendant, Anthony Carney, appeared in the above-entitled court and cause for arraignment and then and there answered that his true name was as charged in said information, waived reading of the information and entered a plea of not guilty to each and all of the charges contained therein.

That on May 15, 1923, the above-entitled cause came duly and regularly on for trial before the above-entitled Court, the Honorable George M. Bourquin, Judge presiding, on the issues joined by

defendant's said plea of not guilty to the charges contained in said information, John L. Slattery, the United States District Attorney for the District of Montana, being present on the part of the United States and the defendant being present in court in person and represented by James H. Baldwin, one of his attorneys; a jury of twelve men was duly and regularly impaneled to try said issues and thereafter and on that day, the following proceedings were had: [66]

Testimony of Fred Bolton, for the Government.

FRED BOLTON, called as a witness on behalf of the United States, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. SLATTERY.)

Q. You may state your name? A. Fred Bolton.

Q. Where do you reside?

A. 630 South Jackson Street.

Q. City of Butte, Montana? A. Yes, sir.

Q. Butte is in the state and district of Montana?

A. Yes, sir.

Q. What were your duties about the 18th of April last year? A. Inspecting gas meters.

Q. For whom? A. The Montana Power.

Q. Did your duties on that day or on or about the 18th of April last year take you to a residence at 205 West Quartz Street in the City of City of Butte? A. Yes, sir.

Q. Had you ever been in that house before?

A. Never, no, sir.

(Testimony of Fred Bolton.)

Q. Did you try to gain entrance that day?

A. Yes, sir.

Q. In what manner?

A. I went up to the front door and knocked on the door and a lady came to the door and I said I would like to inspect your gas meter—

Mr. BALDWIN.—Objected to as incompetent, irrelevant, immaterial and hearsay.

The COURT.—Overruled. [67]

By Mr. BALDWIN.—We will ask a general objection and exception on the same grounds of all testimony to be given concerning statements made and transactions had in the absence of the defendant.

The COURT.—It will be noted.

A. The lady said, “You can’t get in now, wait a minute”; so I waited about twenty minutes I guess and nobody came back so I goes back down to the office to report it to the foreman down there and I happened to run into Mr. Rodda at the police station.

Q. Is he one of the police officers of the city of Butte?

A. Yes, sir; and I told him I thought—

Q. You don’t need to tell what you told him. Now you say you waited for about twenty minutes after the lady told you to wait? A. Yes, sir.

Q. Did you then leave the house? A. Yes, sir.

Q. Did you subsequently return there the same day? A. Yes, sir.

Q. About how long after that?

A. About half an hour.

(Testimony of Fred Bolton.)

Q. Who if anyone accompanied you to this home?

A. Mr. Rodda and Mr. Fairchild of the police station.

Q. Were they both with—were they both that time officers of the city of Butte? A. Yes, sir.

Q. After you got back to the house with these two men what happened?

A. I think Mr. Rodda went up to the front door and Mr. Fairchild and I went back to the back door; I don't know what took place at the front door.

Q. What happened at the back door?

A. Mr. Rodda left us in and I told him I wanted to inspect the gas meter and I goes down the cellar and finds the meter all right and I [68] believe Mr. Rodda found the still—

Mr. BALDWIN.—We ask that the answer I believe be stricken.

Mr. SLATTERY.—No objection.

The COURT.—Very well.

Q. Did you see in that house a still?

A. Yes, sir.

Q. Calling your attention to this still here, come and examine this? A. Yes, sir.

Q. Do you identify that as the still found in that house that day? A. Yes, sir.

Q. Whereabouts in the house was it?

A. Well, it's a double house; it's in the kitchen.

Q. In the kitchen.

A. Yes, sir, I believe two kitchens to the house and in the kitchen on the east side of the house.

(Testimony of Fred Bolton.)

Q. Did you find out while in the house who the lady was in there? A. No, I didn't.

Q. Was the lady in the house in the same room where the still was?

A. No, sir, she was in the other side of the house.

Q. You say that's the still you saw?

A. Yes, sir.

I offer it in evidence.

Mr. BALDWIN.—Objected to as incompetent, irrelevant and immaterial for the reason there is no connection shown between the defendant and the still.

The COURT.—If there is none shown it will be harmless. Overruled.

Mr. BALDWIN.—Exception.

The COURT.—Noted.

Q. Do you know who was living in that house that time?

Mr. BALDWIN.—Objected unless they confine it to that portion of the house in which the still was found.

The COURT.—Overruled. [69]

Mr. BALDWIN.—Exception.

The COURT.—Noted.

A. No, sir.

Q. What else did you see in there besides the still?

A. Well, I seen about—well about a fifty-gallon barrel of mash and a beer keg about half full.

Q. Notice what kind of mash it was?

A. Yes, it was corn.

(Testimony of Fred Bolton.)

Q. Did you—or did it have an odor?

A. Yes, sir.

Q. Do you know what fermentation is?

A. Yes, sir.

Q. Was that in the state of fermentation or not?

A. Yes, sir.

Q. It was? A. Yes, sir.

Q. Did you find any whiskey there or see any whiskey found? A. Yes sir, a small bottle.

Q. Would you be able to identify the bottle?

A. No, sir; I wouldn't.

Q. How long did you remain in there with the officers?

A. Well, I should judge about half an hour.

Cross-examination.

(By Mr. BALDWIN.)

Q. What day was this?

A. I don't know what day it was; it was around April, about the middle of April, 1922.

Q. You made no notes on what you saw or the date or anything concerning this matter?

A. No, sir.

Q. You didn't see Carney there that day, the defendant here? A. No, sir. [70]

Q. You were all through the house with the officers? A. Yes, sir.

Q. Mr. Carney was not present at that time or place? A. No, sir.

Witness excused. [71]

Testimony of Charles Rodda, for the Government.

CHARLES RODDA, called as a witness, and after being duly sworn and examined, testified as follows:

Direct Examination.

(By Mr. SLATTERY.)

Q. You may state your name?

A. Charles Rodda.

Q. What is your business?

A. Police officer of the city of Butte.

Q. How long have you been such?

A. Between ten and twelve years.

Q. As such officer did you on or about the middle or the 18th of April last year go to a house at 205 West Quartz Street in the city of Butte?

A. Yes, sir.

Q. Who accompanied you?

A. Officer Fairchild and Mr. Bolton.

Q. The gentleman who just testified?

A. Yes, sir.

Q. Was it by virtue of a certain report which he made to you or Mr. Fairchild you went to this house? A. Yes, sir.

Q. Do you know who was living in that house that time? A. Mrs. Carney said she owned—

Mr. BALDWIN.—Objected to as hearsay.

The COURT.—Overruled.

Mr. BALDWIN.—Exception.

A. Mrs. Carney said she owns the property, her and her husband.

(Testimony of Charles Rodda.)

Q. I will ask you to look at the defendant and state whether or not he is the husband of Mrs. Carney who made that statement to you?

A. He looks like the man, yes, sir.

Q. When you got to the house on that occasion what occurred?

A. I told Mrs. Carney I was a police officer from the city—

Mr. BALDWIN.—This all goes in under the general objection as [72] hearsay in the absence of the defendant.

The COURT.—I think we will pass over that for the present at least. Sustained.

Q. Did you finally secure entrance to the house?

A. Yes, sir.

Q. How long did it take you to get in after the first knock? A. Not over a minute probably.

Q. What kind of a house was it, is it?

A. It is a large building with a hallway going between the center of the rooms at the right also on the left.

Q. Looking at the still which has been introduced in evidence here, state to the jury whether or not you observed that in the house.

A. It looks like the one. -

Q. What room of the house did you find it in?

A. In the kitchen on the stove on the east side of the building.

Q. And do you know what room or rooms were occupied by the Carneys?

(Testimony of Charles Rodda.)

A. Mrs. Carney was in the west side of the building in the kitchen.

Q. She was in the west side? A. Yes, sir.

Q. Was the defendant Carney himself around there? A. No, sir; not at that time.

Q. How did you happen to find the still?

A. The door was open and I took a glance in the room and there I seen the still.

Q. Was there any odor attracted your attention?

A. Yes, sir; when Mrs. Carney opened the front door.

Q. Was there anybody in the kitchen where the still was? A. No, sir.

Q. Did Mrs. Carney accompany you there?

A. Yes, sir.

Q. And did she enter the kitchen where the still was?

A. She entererd after I opened the door; the door was partially [73] opened.

Q. What did she say if anything?

Mr. BALDWIN.—Objected to as hearsay in the absence of the defendant.

The COURT.—For the present sustained.

Q. Did she make some statement; just say yes or no? A. She made a statement—

Q. Just a moment, just what, yes or no. Did she say anything? A. No, sir.

Q. When you went in the room? A. No, sir.

Q. Did you find anything else in there beside the still?

(Testimony of Charles Rodda.)

A. A fifty gallon barrel of mash and about ten gallons of another barrel, a beer keg.

Q. What kind of mash was it? A. Corn.

Q. In a state of fermentation or not?

A. Yes, sir.

Q. Did you find any moonshine whiskey there?

A. About pretty near a half a gallon.

Q. Looking at this bottle here, state whether or not in your opinion that is the bottle was found there? A. Yes, sir; I think it is.

Q. Did you smell of the contents?

A. Yes, sir, I smelled it before; yes, sir.

Q. What have you to say whether or not the contents appear to be the same as when you found the bottle and contents in that house?

A. About the same I should say.

We offer this in evidence.

The COURT.—Admitted.

Mr. SLATTERY.—I ask that it be called Exhibit “B.”

Q. Did you remove the still, mash and whiskey from the house? [74] A. Yes, sir.

Q. How soon after did you see the defendant Carney? A. The next day.

Q. Where? A. At his residence.

Q. The same place? A. Yes, sir.

Q. What room did you find him in?

A. He was coming in from work.

Q. Where were you?

A. We just got at the back door as he came.

Q. Did you enter the house on that occasion?

(Testimony of Charles Rodda.)

A. Yes, sir.

Q. What room did the defendant go in?

A. In the hallway on the west side.

Q. Was he in the room where you found the still and mash? A. Just in between.

Q. What is the distance between the two rooms?

A. About four feet.

Q. Was there evidence of anybody else occupying that side of the premises?

Mr. BALDWIN.—Objected to as calling for a conclusion.

The COURT.—Overruled.

A. That I couldn't say.

Q. What was there in this kitchen that you saw beside the still and mash and whiskey?

Mr. BALDWIN.—Objected to as too indefinite unless he fixes east or west.

Q. You found only one still there? A. Yes, sir.

Q. In the room where the still was what was there besides the still, mash and whiskey?

A. There was a stove. [75]

Q. Kitchen utensils?

A. Yes, sir, a chair or two.

Q. Did it appear to be a kitchen used by somebody for cooking?

A. It appears the premises was being used.

Q. Did you go into any other room on that side of the house? A. Yes, sir.

Q. Find anybody living there?

A. No person there when we went there.

(Testimony of Charles Rodda.)

Q. Did you find the rooms filled with furniture or fixtures?

A. Yes, sir, a bed in there.

Q. Make any inquiries of anybody whether somebody was living on that side of the house where you found the still?

Mr. BALDWIN.—Objected to as hearsay.

The COURT.—Sustained.

Q. What if anything did the defendant say the next day when you found him?

A. Mr. Carney?

Q. Yes?

A. He said another man had the renting of them rooms, rented them from him.

Q. He said another man had been renting the rooms? A. Yes, sir.

Q. Did he deny he was operating the still?

A. Yes, sir.

If the Court please, I find I am taken by surprise in this action by his testimony.

The COURT.—You may show if he made contradictory statements.

Q. You signed an affidavit did you not, Mr. Rodda, that while engaged in the duties of your—

Mr. BALDWIN.—We ask the affidavit be shown to him.

Q. You saw the affidavit?

A. There are lots of affidavits which we sign when we are in a hurry [76] and have to get out. This is not right, Mr. Carney wasn't there.

Q. You signed that affidavit? A. Yes, sir.

(Testimony of Charles Rodda.)

Q. In that affidavit you stated that while engaged in the discharge of your official duties you were at the premises situated at 205 West Quartz Street and found therein a twelve gallon still together with equipment used in connection of the same set up and in operation and also found Anthony Carney in said premises and manufacturing intoxicating liquor. That's what you said in the affidavit?

A. There is a mistake in it, whoever wrote it up; yes, sir.

Cross-examination.

(By Mr. BALDWIN.)

Q. Now, Mr. Rodda, in making this affidavit, as I understand it, you were mistaken if you said that you found Carney in charge of the premises engaged in the operation of the still and the manufacture of intoxicating liquor. He wasn't there?

A. That wasn't drawn up the way our report was turned in.

Q. A portion is written in handwriting after the conclusion of it?

The COURT.—Not all of it.

Q. And manufacture of intoxicating liquor was written in by hand or was it there when you signed it? A. I never seen it there.

Q. Anyway it isn't right? A. No, sir.

Redirect Examination.

(By Mr. SLATTERY.)

Q. Do you know whose writing that is?

A. I don't; no, sir.

(Testimony of Charles Rodda.)

The COURT.—Q. Where did you sign that affidavit?

A. It was brought to the police station.

Q. Before whom did you sign it?

A. Well, I couldn't say. [77]

Q. Didn't you read it before you signed it?

A. We had a hurry up call that day.

Q. I suppose you have hurry up calls every day?

A. Some days we do; not every day.

Witness excused. [78]

Testimony of Sam Fairchild, for the Government.

SAM FAIRCHILD, called as a witness, and after being first duly sworn and examined, testified as follows:

Direct Examination.

(By Mr. SLATTERY.)

Q. You may state your name?

A. Sam Fairchild.

Q. What is your business?

A. Police officer, city of Butte.

Q. How long have you been such?

A. Sixteen years.

Q. About the 18th of April last year did you accompany Mr. Rodda, who just testified, and Mr. Bolton to a building at 205 West Quartz Street in the city of Butte? A. Yes, sir.

Q. Did you gain entrance to the house?

A. Yes, sir.

Q. What did you find there in the nature of a still or any whiskey?

(Testimony of Sam Fairchild.)

A. We found a half a gallon I should judge, half a gallon of moonshine and sixty gallons of mash and a still.

Q. Does that still there look like it?

A. Yes, sir.

Q. Does this look like the moonshine whiskey found there? A. Yes, sir.

Q. Which side of the house?

A. On the east side.

Q. What kind of room? A. In the kitchen.

Q. Was—did you see any person in that room besides you two officers? A. No, sir.

Q. Did you see a woman there or a lady? [79]

A. I saw a lady but she was on the west side of the kitchen.

Q. Did the lady accompany you or anybody else into the room where this whiskey was found?

A. No, sir.

Q. Did you see any other person there at all beside this lady? A. No, sir.

Q. Didn't see the defendant there?

A. No, sir; we didn't.

Q. Do you know Carney the defendant?

A. No, sir, I have saw him; I saw him the next day.

Q. Well, Mr. Fairchild, you also made an affidavit did you not? A. Yes, sir.

Q. An affidavit with respect to this case?

A. Yes, sir. I should or will explain this matter to the Judge.

(Testimony of Sam Fairchild.)

Q. First let me ask you this. I will say this is the same affidavit I showed to Mr. Rodda?

A. Yes, sir, the same.

Q. In that affidavit you stated you found the defendant Anthony Carney in charge of the premises engaged in the operation of the still and in the manufacture of intoxicating liquors;—you say now that is a mistake?

A. I want to explain this to the Court. The day this affidavit was signed they hollered for me—I am driving the police car—and I signed that and I did not read it; didn't have a chance to. It was a mistake of mine which I should have done but I couldn't as I was called very quick and I couldn't recall the call I made; it was a quick call and I went up and signed the report and I got the call and someone called me to sign that and I did.

Mr. BALDWIN.—No cross-examination.

The COURT.—Q. What else was on the east side of the house besides what you found? [80]

A. We found the still and whiskey in the kitchen; in the next room to it we found a bed setting in that room and about sixty gallons of mash at the foot of the bed, a fifty gallon barrel and a ten gallon keg; that was all I saw there.

Q. Any clothing or anything?

A. No, sir; nothing more than bed clothing.

Q. Any tables, dishes, anything else?

A. No, sir.

Q. Were the doors locked on that east side?

A. No, sir; they were not.

(Testimony of Sam Fairchild.)

Q. Did you see anyone's shoes or hats or anything? A. No, sir, I don't think I did.

Q. How many rooms on that east side?

A. I think there are three rooms on that side; I don't know; I couldn't see.

Mr. SLATTERY.—Q. Was there any odor that was noticeable throughout the house? A. Yes, sir.

Q. What was the odor?

A. It was a mash smell; you could smell the mash. It was fermenting.

Mr. SLATTERY.—The Government rests.

Mr. BALDWIN.—We ask at this time if your Honor please for a directed verdict on the grounds there is not sufficient evidence showing the defendant had any personal knowledge of this transaction or was personally present or had control of the particular portion of the premises in which the evidence is said to have been found, the testimony on that point being that the defendant was not present and was arrested at the following date and he said that someone else rented the premises and he had no control over it.

The COURT.—The evidence is enough to hang a man if he was on trial for murder. The motion is denied.

Mr. BALDWIN.—Ask an exception. [81]

The COURT.—It will be noted.

Testimony of Mrs. Anthoney Carney, for Plaintiff.

MRS. ANTHONY CARNEY, called as a witness, and after being first duly sworn and examined testified as follows:

Direct Examination.

(By Mr. BALDWIN.)

Q. You may state your name?

A. Mrs. Anthoney Carney.

Q. You are the wife of the defendant?

A. Yes, sir.

Q. And you lived with him at 205 West Quartz Street in Butte, last year and this year?

A. I have lived with him going on eight years at the same address.

Q. In that house you live in you live on the west side? A. Yes, sir.

Q. And your husband and you reside on the west side and what do you do with the east side of the building?

A. We have it rented continually; that is any time we could.

Q. And how is the building arranged Mrs. Carney; can you explain to the jury the construction of the building, that is, the method in which it is planned?

A. It is a five-room frame building, a hallway straight through from the front door with two rooms on the east side and three to the west and hot and cold water to supply the housekeeping rooms and I live on the west side of the house.

(Testimony of Mrs. Anthoney Carney.)

Q. You and your husband occupy three west rooms and have been renting the two east rooms?

A. Yes, sir.

Q. For what length of time has that been the custom?

A. Since we been there; the first year I had boarders and then I gave them up and since then rented them housekeeping rooms. [82]

Q. Were those rooms on the east side rented in the month of April, 1922? A. Yes, sir.

Q. Were they rented through that month?

A. Up until the time of the raid.

Q. Then—that's the time the men came in and got this still? A. Yes, sir.

Q. Now, Mrs. Carney, did you have any control of those rooms during that month up to that time the officers came there?

A. No, sir; I gave them over the key and had nothing to do with it.

Q. As I understand it there is a hallway running through the building? A. Yes, sir.

Q. A back entrance and front entrance to the building? A. Yes, sir.

Q. This entrance or entrances lead to the hall from the rear and front of the building?

A. Yes, sir.

Q. Now, when the officers came there where was your husband, Mr. Carney?

A. He was working at the Bell mine.

Q. How long had he been working there that time?

(Testimony of Mrs. Anthoney Carney.)

A. He is always working there; mostly all the time working. He was working there right along steady at the time.

Q. Working every day at the Bell mine at what capacity?

A. Well, he was a contract miner at the time.

Q. You mean a man working for the company on contract gets so much a foot for work done?

A. Yes, sir.

Q. He was employed each day that month was he? A. Yes, sir.

Q. Has he been employed continuously since?

A. He got a job as shift boss shortly after working for the same [83] company.

Q. Working at the same mine since then?

A. Yes, sir.

Q. And been made a shift boss? A. Yes, sir.

Mr. SLATTERY.—Objected to as leading and immaterial.

The COURT.—She has answered. Proceed.

Q. Mrs. Carney, was he home at the time the officers came there? A. No, sir.

Q. Did they arrest anyone when they came there that day? A. No, sir.

Q. Now, Mr. Bolton has testified that he talked to some woman who said she couldn't let him in at the moment but would let him in later?

A. Yes, sir.

Q. Tell the Court what that occurrence was?

A. I answered the door; I wasn't prepared, I had a sick baby, and I went back and he wanted

(Testimony of Mrs. Anthoney Carney.)

to see the meter and the time I got prepared he was at the foot of the steps and I said all right and when I looked out he went in a truck or a machine and went down the street and I shut the door and came back in.

Q. Did you know that time who he was?

A. He said he wanted to see the meter.

Q. The meter is situated in the cellar?

A. In the cellar of my kitchen; my meter for my gas stove is in my kitchen.

Q. That is on the west side of the house?

A. Yes, sir.

Q. Where is that meter situated?

A. In the cellar.

Q. You went back to arrange things and allow him to go through the house and when you came back he was gone? [84]

A. Yes, sir; I guess he didn't hear me or heed me.

Q. Did you have any reason there that you wanted to arrange your kitchen?

A. Well, I wasn't fully dressed and had a baby crying and I couldn't very well let him in.

Q. That is the reason you refused him admittance or told him wait a while? A. Yes.

Mr. SLATTERY.—Objected to as leading.

The COURT.—Sustained.

Q. Do you remember when your husband was arrested?

A. He went to work the next day and when he was coming off shift two officers came right after

(Testimony of Mrs. Anthoney Carney.)

him and he set his bucket in the hall and they arrested him.

Q. Arrested him and took him from the building? A. Yes, sir.

Q. That was the following day? A. Yes, sir.

Q. Had you ever noticed this still in the east side of the building until the officers got there?

A. No, sir; not until Rodda opened the door.

Q. You saw the still that time? A. Yes, sir.

Q. Did you know before that time it was in the building? A. No, sir; I didn't.

Q. Know there was any mash in the east side of that building? A. No, sir; I didn't.

Q. Know there was any moonshine whiskey or liquor being made there? A. No, sir; I didn't.

Q. Do you know what became of the parties who were occupying that building at that time? Know where they went?

A. He was there about half an hour before the time they came and [85] I heard him in the hallway before when they opened the door and I went in after him and found a copper boiler in the clothes closet, not that (pointing to a still), and a coil something like that with it and a white pitcher with some liquid in it.

Q. Do you mean a wash boiler like the bottom of this?

A. No, sir; it was white outside and no cover at all on it.

Q. And something there with this coil?

(Testimony of Mrs. Anthoney Carney.)

A. Yes, sir; but not a boiler like that; that is he took a boiler out of there but not that.

Q. And had your husband access to these rooms at all during that month?

A. I could swear he never goes into them while rented unless there is something broken down or something too heavy to lift, a chimney or something.

Q. In other words repairs a man has to make as he goes in? A. Yes, sir.

Q. Who has control of the renting of those rooms?

A. I have these rented now to a man and woman.

Q. Who has charge of renting those rooms?

A. I have.

Q. Mr. Carney take any part in it, collecting any rent?

A. No, sir; he never bothers with it.

Cross-examination.

(By Mr. SLATTERY.)

Q. Of course you told him who is renting the place? A. Yes, sir.

Q. He owns the building himself? A. Yes, sir.

Q. He owned it of course during the month of April when the officers found the still, mash and moonshine whiskey? A. Yes, sir.

Q. And had owned it for some years before that?
[86]

A. Yes, sir.

Q. Now, this particular room in which the still and mash was found there is only just a few feet

(Testimony of Mrs. Anthoney Carney.)

from the door of the rooms where you and Mr. Carney was living?

A. Across the hall to the other side of the house.

Q. Just a few feet across; it's in the same house?

A. Yes, sir.

Q. Under the same roof? A. Yes, sir.

Q. How wide is that hall?

A. I couldn't tell you.

Q. Just an ordinary hall? A. Yes, sir.

Q. And about how long is it, Mrs Carney?

A. Just a whole length of the house clean through.

Q. Is it as long as this room is wide?

A. From here to that gate or farther (indicating).

Q. The odor of the mash in there was very strong the time the officers came? A. I didn't get it.

Q. Didn't you get the odor of it? A. No, sir.

Q. Were you accustomed to it?

A. I am not accustomed to it.

Q. Isn't it a fact, Mrs. Carney, that you were at that time taking care of the still for your husband and isn't that the reason why you kept Mr. Bolton waiting twenty minutes on the front porch?

A. No, sir.

Q. That is the real reason is it not?

A. No, sir.

Q. You do admit, don't you, that the odor of the mash was very strong? [87]

A. I can't admit that.

Mr. BALDWIN.—Objected to. That's not her statement.

(Testimony of Mrs. Anthoney Carney.)

The COURT.—Overruled.

Q. Who was the fellow that you say the place was rented to where the still was?

A. A young man, light complected.

Q. What was his name?

A. Pat O'Donnell; he handed me twenty dollars for the room and asked me for the keys and I gave them to him.

Q. The door was unlocked when the officers were there?

A. I don't know that.

Q. Was the door unlocked when the officers went in where the still was?

A. I don't know; he took a handful of keys out of his pocket.

Q. Didn't you go into the room when the officers were there?

A. Yes, sir.

Q. Mrs. Carney, didn't you say something to one of the officers about not having a search-warrant?

A. I did.

Q. What did you say?

A. I said, "Who are you?" and he said, "I am an officer."

Q. What did you say about the search-warrant?

A. I don't remember saying anything.

Q. Didn't you say something to him about a search-warrant?

A. I don't remember. I asked him who was he and he said an officer.

Q. A moment ago you did say you said some-

(Testimony of Mrs. Anthoney Carney.)

thing to him about a search-warrant; what was it you said?

A. I didn't say.

Q. Did you say anything about a search-warrant?

A. No, sir.

Q. It was in the room when you asked him who he was?

A. Yes, sir; I said, "Who are you?" and he said, "An officer of the law." [88]

Q. Isn't it a fact that when the officers came up to the door one of them came to the front door and he told you he was a policeman, police officer?

A. No, sir; he was in the kitchen before I seen him; it was the gas man that wanted to see the meter came to the front door; the door was wide open when the officer came in.

Q. When the gas man and officers came, the gas man and one officer went to the back door?

A. They didn't come together; the meter man came first and went away and I didn't see the others which way they came because I was sitting in the rocking-chair in the kitchen until they were standing alongside of me.

Q. You were sitting in the kitchen when they came?

A. Yes, sir.

Q. How far is the kitchen from the room where the still was?

A. On the west side of the house.

Q. How many feet?

(Testimony of Mrs. Anthoney Carney.)

A. Quite a distance; there is three doors between me and the other kitchen.

Q. Tell us by objects here in the room?

A. About as far as my husband and three doors come between them.

Q. So that's about as far as you were from the room where the still was when the officers came?

A. Yes, sir.

Q. What did they do with the mash.

A. They asked me what to do with it to throw it in the sewer, and I told them it would block the sewer and they threw it in the back yard.

Q. What kind of a stove was there in the room where the still was?

A. A coal stove and gas stove, but the gas was not in use.

Q. Both in there?

A. Yes, sir.

Q. The coal stove hasn't been used lately? [89]

A. Yes, sir; used continuously to heat the rooms.

Q. Was it a stove that was large enough on which that still could rest?

A. Yes, he could set it on it.

Redirect Examination.

(By Mr. BALDWIN.)

Q. As I understand it the rooms were fitted up for housekeeping?

A. Yes, sir.

Q. A coal stove they could use or a gas stove they could use if they chose?

A. Yes, sir.

(Testimony of Mrs. Anthoney Carney.)

Q. And the party using the premises saw fit to use the coal stove?

A. Yes, sir.

Q. Now when the officers came you didn't go to the door at all, did you?

A. No, sir.

Q. The doors were open and they could walk in and did walk in?

Mr. SLATTERY.—Objected to as leading.

The COURT.—Sustained.

Q. When did you first notice the officers, where were they?

A. Standing in front of me, the meter man opening the cellar door.

Q. In what room was that?

A. In my kitchen.

Q. On which side of the building?

A. The west side.

Q. And then you asked them who they were?

A. I thought they were just going to see the meter; not until I seen the mash myself.

Mr. SLATTERY.—Objected to as repetition.

The COURT.—Sustained.

Q. Now Mrs. Carney, did you see O'Donnell after that time; did he come back after the 18th?

[90]

A. No, sir; I went down to the city hall then and the children said he came in.

Mr. SLATTERY.—Objected to as not responsive to the question; move to strike the answer.

(Testimony of Mrs. Anthoney Carney.)

The COURT.—Sustained. The answer may be stricken.

A. No, I don't know.

Q. That is you don't know of your own knowledge?

A. No, sir.

Mr. SLATTERY.—Objected to as leading.

The COURT.—Sustained.

Q. You later rented the room to others?

Mr. SLATTERY.—Objected to as leading and immaterial.

The COURT.—Sustained. [91]

Testimony of Mrs. Gannon, for Plaintiff.

Mrs. GANNON, called as a witness, and after being duly examined, testified as follows:

Direct Examination.

(By Mr. BALDWIN.)

Q. You may state your name.

A. Mrs. Gannon.

Q. Where do you live?

A. 514 North Main Street.

Q. How long have you lived in Butte?

A. Thirteen years.

Q. Are you acquainted with Mrs. Carney, Mrs. Anthoney Carney, the witness who preceded you?

A. Yes, sir.

Q. How long have you known her?

A. About twelve years.

Q. Do you know the location of her residence at 205 West Quartz Street?

(Testimony of Mrs. Gannon.)

A. Yes, sir.

Q. How long have you known those premises?

A. About seven years.

Q. Were you familiar with those premises in April, 1922, that is April last year?

A. Yes, I go there to see them.

Q. Do you know who was using those three rooms on the east side or the rooms on the east side of the hall of that building in April last year?

Mr. SLATTERY.—Objected to as too indefinite as to time.

The COURT.—Modify your question.

Q. Did you know who was using the rooms on the east side of the hall in the early part of April last year?

A. I was over there one day and Mrs. Carney made me acquainted [92] with this fellow and said this is the fellow who was renting her rooms and I saw him there another time.

Q. Do you know when the place was raided?

A. No, I wasn't there, but I heard it.

Q. Do you know about what time it was, it was on the 18th of April, 1922.

A. Yes, sir.

Q. You say Mrs. Carney made you acquainted with this fellow before that time?

A. Yes, sir.

Q. And did you see him on those premises after she made you acquainted and before the 18th of April last year again?

A. Yes, sir; I just seen him there that one time.

Q. You saw him that one time?

(Testimony of Mrs. Gannon.)

A. Yes, sir.

Q. Do you know what the custom followed by Mrs. Carney was with reference to the use of those rooms on the east side, what was done with them?

Mr. SLATTERY.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Sustained.

Cross-examination.

(By Mr. SLATTERY.)

Q. You don't know, of course, whether it was the 10th of April or 20th of April when you met some fellow at that house?

A. Really, I don't know what date it was.

Q. Did you see this fellow you say you met in Mrs. Carney's on Mrs. Carney's side of the house?

A. I just happened to be going in the hall and he was coming out and Mrs. Carney made me acquainted.

Q. It was in the hallway?

A. Yes, sir. [93]

Q. You don't know, of course, when it was?

A. I know just a short time before the raid.

Q. A short time before the raid?

A. Yes, sir; a short time before that.

Q. When was the place raided, do you know?

A. Around the 18th I guess.

Q. Of what?

A. April. [94]

Testimony of William Colmer, for Plaintiff.

WILLIAM COLMER, called as a witness, and after being first duly sworn and examined, testified as follows:

Direct Examination.

(By Mr. BALDWIN.)

Q. You may state your name.

A. William Colmer.

Q. Where do you live?

A. 1009 Whitman Avenue.

Q. What is your occupation?

A. Soliciting clerk for Gallagher grocery.

Q. Does business in Butte, does it?

A. Yes, sir.

Q. How long have you held that place with company?

A. Well, I have been with him around three years ago the first of May.

Q. Working in that capacity for the Gallagher grocery company in April last year?

A. Yes, sir.

Q. As such solicitor did you have occasion to solicit orders at 205 West Quartz Street, Butte?

A. Yes, sir.

Q. Did you get orders from those premises in April, 1922?

A. Yes, sir.

Q. Did you solicit orders from Mrs. Carney?

A. Yes, sir.

Q. Did you get them?

(Testimony of William Colmer.)

A. Yes, sir.

Q. How long has Carney been dealing with you?

A. Dealing with me probably six years.

Q. He was living at the same place during that time?

A. Yes, sir. [95]

Q. Did you solicit anyone else in these same premises, 205 West Quartz Street in the month of April, 1922?

Mr. SLATTERY.—Objected to as too indefinite as to time.

Q. Do you know the date the officers went there and made a raid?

A. I wasn't there the date they made the raid, but I was there probably within a day or two afterwards.

Q. Taken as the date April 18th, 1922, as the time the officers went into the house and took a still, mash, etc., had you before that and in the month of April, 1922, solicited orders in the building from other than Mrs. Carney?

A. Yes, sir; I have.

Q. Did you get orders?

A. Yes, sir.

Q. From whom did you get those orders?

A. Pat O'Donnell.

Q. Which side of the building was O'Donnell on?

A. On the east side.

Q. East—there is a hall running through into the building?

A. Yes, sir.

(Testimony of William Colmer.)

Q. Which side of that hall did Carney live in those years?

A. Carneys lived on the west side always.

Q. During those six years and up until April 18th, 1922, what was done with the rooms on the east side of the hall?

A. They always been rented.

Q. You solicited those rooms for six years?

A. Yes, sir.

Q. Got orders from them as well as Carneys?

A. Yes, sir; there has been several different parties in there.

Q. You say you sold to Pat O'Donnell in the early part of April?

A. I sold him in April.

Q. Did you sell him materials up to approximately the 18th day?

A. I couldn't say definitely what date it was because he always [96] paid cash, but I know I sold him in April.

Q. He had no account and was a cash customer?

A. Yes, sir.

Mr. SLATTERY.—Objected to as leading.

The COURT.—Sustained.

Q. You were not present the time the officers raided it?

A. No, sir.

Q. Ever see a still there?

A. No, sir; I never did.

Q. You were in that building every day soliciting?

A. Not every day.

(Testimony of William Colmer.)

Q. How often in the building?

A. Once a week, always.

Q. Ever notice any smell of mash or anything like that?

A. I never have; no, sir.

Q. Did you see or smell or hear anything there to cause you to believe they were making moonshine in the premises?

Mr. SLATTERY.—Objected to as leading.

The COURT.—Sustained.

Cross-examination.

(By Mr. SLATTERY.)

Q. Are you familiar with the odor of corn mash in the state of fermentation?

A. Yes, sir; I am.

Q. Smelled it going around the homes here in Butte?

A. I wouldn't say it is in the homes, but I smelled wet corn lots of times.

Q. Do you know what corn in the state of fermentation is?

A. I couldn't exactly say, but I seen wet corn.

Q. You are testifying only from memory in respect to having been there from the early part of April last year?

A. Yes, sir. [97]

Q. You wouldn't have to look up records?

A. I wouldn't have to look up records; I know I made it every week in six years.

Q. You wouldn't swear you took orders from Pat O'Donnell in the week from the 11th to the 18th of April, 1922?

(Testimony of William Colmer.)

A. I couldn't swear to that, no.

Q. You wouldn't swear to that?

A. I wouldn't swear what week it was.

Q. This house the Carneys own is a small house, is it not?

A. No, sir; I would call it a good size house.

Q. Its—does the hallway run the length of it?

A. Yes, sir.

Q. How long is the hallway?

A. I would judge maybe eighteen or twenty feet.

Q. That runs the length of the house?

A. Not the exact length; it runs in and there is a toilet here and comes down here (indicating).

Q. What would you say the outside dimensions of the house?

A. Thirty feet.

Q. Square?

A. Thirty feet through the hall—on the outside of the house?

Q. Yes.

A. I couldn't tell; they are large size rooms all of them and there is five of them in there.

Q. The hallway is about how wide?

A. I should judge about three feet and a half or four feet.

Q. Doors opposite each other?

A. Not exactly.

Q. Very nearly?

A. Close; yes, sir.

Q. So that a strong odor of mash in any of those

(Testimony of William Colmer.)

rooms there would be very apparent throughout the hallway? [98]

Mr. BALDWIN.—Objected to as calling for a conclusion.

The COURT.—Sustained.

Q. You are not swearing this still, mash and moonshine, the seventy gallons of mash were not found in the Carney home on the 18th of April?

A. No, sir.

Redirect Examination.

(By Mr. BALDWIN.)

Q. But you know the Carney home was on the west side of the hall?

A. Yes, sir. [99]

Testimony of Martin Walsh, for Plaintiff.

MARTIN WALSH, called as a witness, and after being first duly sworn and examined, testified as follows:

Direct Examination.

(By Mr. BALDWIN.)

Q. You may state your name?

A. Martin Walsh.

Q. Live in Butte?

A. Yes, sir.

Q. How long have you lived here?

A. Twelve years.

Q. Acquainted with the defendant Anthoney Carney?

A. Yes, sir.

(Testimony of Martin Walsh.)

Q. How long have you known him?

A. About twelve years.

Q. Known him twelve years?

A. Yes, sir.

Q. Are you acquainted with the place he lives at 205 West Quartz Street?

A. Yes, sir.

Q. How long have you been acquainted with those premises?

A. About six years.

Q. Now, Mr. Walsh, were you acquainted with those premises in April, 1922?

A. Yes, sir.

Q. Do you know what was done with the premises that month, with the east side of the building, the portion east of the hallway?

A. Yes, sir.

Q. What was done with them, that is who used the rooms on the east side of the hall?

A. A fellow named Pat O'Donnell.

Q. Did you see him there in April, 1922, and before the 18th? [100]

A. Yes, sir.

Q. Do you—were you present at the time the officers were there or do you know when they were there? A. No, sir.

Q. But you know before the 18th that O'Donnell was using the east side of the building?

A. Yes, sir.

(Testimony of Martin Walsh.)

Cross-examination.

(By Mr. SLATTERY.)

Q. Were you in the kitchen on the opposite side of the hall from where the Carneys purported to live? A. No, I never was in that kitchen.

Q. Never went in on that side of the house at all?

A. No, sir.

Q. You been out to Carney's?

A. No, sir; I never.

Q. Were you there just shortly before the 18th of April last year? A. Yes.

Q. How long before the 18th? A. In March.

Q. You were there in March?

A. March and April; I be there two or three times a week.

Q. Calling on Carney? A. Yes, sir.

Q. Did you help to take and put a fifty gallon barrel in his house? A. No, sir.

Q. Did you help him take a still up to his house?

A. No, sir.

Q. How far do you live from Carney's place or were you living that time?

A. I lived on North Main Street.

Q. How far from Carney's place? [101]

A. Five blocks.

Q. You went there two or three times a week?

A. Yes, sir.

Q. Generally brought something away with you when you came away, didn't you? A. No, sir.

(Testimony of Martin Walsh.)

Redirect Examination.

(By Mr. BALDWIN.)

Q. What was your purpose of visiting a friendly call?

Mr. SLATTERY.—Objected to as immaterial.

The COURT.—He may answer.

A. Just to see Carney.

Q. Counsel has asked you if you were in the kitchen presumed to be occupied by Carney; just tell what portion of that building Carney used for whom during the last six years?

A. He used the west side.

Q. Did Carneys ever use the rooms or live on the east side during that time?

A. No, sir, not that I know of. [102]

Testimony of Joe Nevin, for Plaintiff.

JOE NEVIN, called as a witness, and after being first duly sworn and examined, testified as follows:

Direct Examination.

(By Mr. BALDWIN.)

Q. You may state your name. A. Joe Nevin.

Q. Do you live in Butte? A. Yes, sir.

Q. How long have you lived here?

A. Thirty-five years.

Q. What is your occupation?

A. Assistant foreman of the Bell and Diamond Mines.

Q. How long have you held that place?

A. About six years.

(Testimony of Joe Nevin.)

Q. Are you acquainted with Anthony Carney?

A. Yes, sir.

Q. How long have you known him?

A. About thirteen years; thirteen or fourteen years.

Q. During the month of April do you know where Mr. Carney was employed? A. Yes, sir.

Q. Where? A. At the Diamond Mine.

Q. Working for you? A. Yes, sir.

Q. And you kept his time, did you?

A. Yes, sir.

Q. Did he miss any shifts in April, 1922?

A. He was turned over to the shift boss on the 11th day of April.

Q. By—up to that time he missed no time?

A. No, sir.

Q. Do you know his reputation for truth, honesty and integrity? [103]

A. Always have found him a good man.

Q. How long has he been working under your direct supervision?

A. Since the 26th of April; that's the time he went bossing the second time; he bossed before for us.

Q. How many years has he worked altogether under your direction?

A. I think about twelve years.

Q. Has he been a steady workman?

A. Yes, sir.

Q. And what position does he occupy at the Bell mine this time?

(Testimony of Joe Nevin.)

A. The present time he is a shift boss; at the Diamond mine.

Q. What was his position in April, 1922?

A. Prior to going shift boss?

Q. Yes.

A. He was a pipeman.

Cross-examination.

(By Mr. SLATTERY.)

Q. You say from the 11th of April, 1922, he became a shift boss? A. No, the 26th of April.

Q. Was he working between the 11th and 18th of April, 1922?

A. Yes, sir; a shift boss was put on and he was turned on to shift boss Belangie on the 11th day of April.

Q. He wasn't under your direct supervision?

A. Yes, sir; he was as a day shift man.

Q. His duties out there at the mine lasted only eight hours a day? A. Yes, sir.

Q. That gave him sixteen hours to put in at home if he wanted to? A. Yes, sir.

Q. Then he had twice as much time to do something at home as he had at the mine?

A. Sure. [104]

Testimony of Anthoney Carney, in His Own Behalf.

ANTHONEY CARNEY, called as a witness, and after being first duly sworn and examined, testified as follows:

(By Mr. BALDWIN.)

Q. You may state your name.

(Testimony of Anthoney Carney.)

A. Anthoney Carney.

Q. Live in Butte? A. Yes, sir.

Q. How long have you lived in Butte?

A. About thirteen or fourteen years.

Q. Married? A. Yes, sir.

Q. Living with wife and children? A. Yes, sir.

Q. How many children have you?

A. I got five.

Q. Of what ages; what is the oldest and youngest age?

Mr. SLATTERY.—Objected to as immaterial.

The COURT.—Answer briefly.

A. Oldest is ten and the youngest is six months.

Q. During the last six years where have you been living? A. 205 West Quartz Street.

Q. During that time what have you been doing for a living? A. Mining.

Q. Working at what place?

A. Well, different mines; the Original, Bell and Diamond.

Q. And what are you doing now for a living?

A. Shift boss.

Q. At what place? A. The Bell mine.

Q. Ever been in trouble of any kind before this case came up? A. No, sir.

Q. Now, Mr. Carney, what is the arrangement of the building in [105] which you live?

A. Well there is—the building faces south, north and south and there is a hallway running from the north to the south and there are three rooms on the west side and two on the east side with bathroom

(Testimony of Anthoney Carney.)

and toilet and each room opens to the hallway and the hallway runs from the front into the back.

Q. Have you ever lived in the east side?

A. No, sir.

Q. Have you ever used the rooms on the east side of that hall except for renting?

A. That's all to rent.

Q. Were those premises, that is the two rooms on the east side of the hall rented in April, 1922?

A. Yes, sir.

Q. Who had charge of the renting of those rooms? A. Mrs. Carney had.

Q. Did you pay any personal attention to it?

A. Very little.

Q. Who was occupying those rooms to the east of the hall in April, April 18th, 1922?

A. This man O'Donnell.

Q. Did you rent the premises to him?

A. No, I didn't rent them.

Q. Do or did you know he was making moonshine in those premises? A. I should say not.

Q. Did you know there was a still in the building at all? A. No, sir.

Q. Did you know there was any mash in the building? A. No, sir.

Q. Now, Mr. Carney, were you home the time the officers called on the 18th? A. No, sir. [106]

Q. Where were you at that time?

A. I was at the mine working.

Q. At work? A. Yes, sir.

(Testimony of Anthoney Carney.)

Q. And when you returned home what time was it? A. About five o'clock in the evening.

Q. Did you see any officers that day? A. Yes.

Q. Who did you see?

A. Mr. Rodda that testified here and Gerry.

Q. Rodda and Gerry came up on the 18th?

A. Yes, sir; after I came off shift they were waiting and came into the house right after me.

Q. Did you have a talk with Gerry and Rodda?

A. They asked me about these premises and I told them they were rented.

Q. Tell them who rented them? A. Yes, sir.

Q. Tell where he was working?

A. I told them what he told me that he was working at the Mountain View mine.

Q. And did they arrest you that evening?

A. No, sir.

Q. Did you see Fairchild there at all?

A. No, sir; this is the first time I seen him right here.

Q. When were you arrested, Mr. Carney?

A. I believe it must be two days after.

Q. Have you ever talked to Gerry about this case or with Rodda or Fairchild since the time you were arrested? A. No, sir.

Q. Has anyone talked to them with your knowledge or consent? A. Not that I know of. [107]

Cross-examination.

(By Mr. SLATTERY.)

Q. You were maintaining this house at 205 West

(Testimony of Anthoney Carney.)

Quartz Street on or about the 18th of April last year?

Mr. BALDWIN.—Objected to as immaterial; not proper cross-examination.

The COURT.—Ask him if he owned it.

Q. You owned it did you not? A. Yes, sir.

Q. Kept it in repair? A. Yes, sir.

Q. And occupying one side? A. Yes, sir.

Q. In going—in entering your house did you generally go in the front door or back door?

A. Sometimes either way.

Q. You would pass the kitchen where the still was? A. Yes, sir.

Q. How close would you come to that door?

A. Come right by it.

Q. Almost touch it going by?

A. Yes, sir; the hall there about four feet wide.

Q. You learned the still was in the house?

A. Yes, I found it out.

Q. Who told you that? A. Gerry and Rodda.

Q. Until they told you you never suspected the still there? A. No, sir.

Q. Did they tell you also there were seventy gallons of mash? A. They told me they found it.

Q. You never smelled mash?

A. No, sir. [108]

Q. You don't have any trouble with your sense of smell?

A. Well, it isn't the very best.

Q. How long has it been bad?

A. It never was good.

(Testimony of Anthoney Carney.)

Q. Did it surprise you to learn that that still there and seventy gallons of mash and moonshine whiskey were in a room the door of which you almost touched with your elbow two or three days in passing it? A. Yes, sir; it surprised me.

Redirect Examination.

(By Mr. BALDWIN.)

Q. Now, when you went in and out that door wasn't open?

Mr. SLATTERY.—Objected to as leading.

The COURT.—Sustained.

Q. Now, Mr. Carney, when you went in and out from work and in and out from your home what was the condition of that door leading into the kitchen on the east side with reference to being closed or open?

Mr. SLATTERY.—Objected to as too indefinite.

The COURT.—Overruled.

A. As a rule that side of the house is always closed.

Q. Did you ever have occasion during the month of April, 1922, to go into *the* that side of the house?

A. No, sir, not since it was rented by this man O'Donnell.

Q. Do you go into those rooms any time except between tenants and excepting fixing the rooms?

A. No, sir; never, unless something is broken down.

Q. When you went home did you see any still in the building; that is the night the officers were there? A. No, sir.

(Testimony of Anthoney Carney.)

Q. Did you see a bottle of so-called moonshine?

A. No, sir; that's the first I seen of it. [109]

Q. Do you know that was in the building prior to that time? A. No, sir.

Q. See a barrel of any kind there?

A. No, sir.

Q. See any mash in that building? A. No, sir.

Q. And did you authorize anybody to make any mash or moonshine? A. No, sir. [110]

Testimony of Charles Rodda, for Plaintiff (Recalled).

CHARLES RODDA recalled to witness-stand.

(By Mr. BALDWIN.)

Q. You saw Carney on the night you made the raid? A. No, sir.

Q. What night was it you made the arrest?

A. On the night—it was the 18th or 17th; I think on the 18th, yes, sir.

Q. Did you arrest him the night you found the still in these premises?

A. No, sir; the next night.

Q. Was Fairchild there when you made the arrest? A. No, sir.

Q. Who assisted you in making the arrest?

A. Officer Gerry.

Q. And at that time Mr. Carney was coming off shift. A. Yes, sir.

Mr. SLATTERY.—No cross-examination.

Mr. BALDWIN.—That's the defendant's case.

Mr. SLATTERY.—We will recall Charles Rodda.

**Testimony of Charles Rodda, for the Government
(Recalled).**

CHARLES RODDA recalled to stand.

(By Mr. SLATTERY.)

Q. Mr. Rodda, when you went up to the doorway or door in this house on the occasion you testified to was the door open or closed?

A. The door was closed.

Q. What did you do?

A. Knocked at the door.

Q. Who came to the door? A. Mrs. Carney.

Q. Is that the first place in or about that house you saw her? A. Yes, sir.

Mr. BALDWIN.—Objected to as unnecessary repetition and not proper rebuttal. [111]

Q. Let me ask you what, if anything, did she say to you about a search-warrant?

A. She didn't say anything about the search-warrant until after we got the still and mash.

Q. What did she say then?

A. She said have you got a search-warrant and I said no, lady, we got a still.

Q. Was she present to see you take the still?

A. Yes, sir.

Q. How close did she stand?

A. Right close by me; probably two feet away.

Q. Did she make any explanation to you about the presence of the still or mash or moonshine in the house? A. No, sir.

(Testimony of Charles Rodda.)

Q. She didn't say anything about any man by the name of O'Donnell?

A. After a while she did.

Q. Was that before or after she asked if you had a search-warrant? A. After.

(By Mr. BALDWIN.)

Q. She told you that time didn't she the man named O'Donnell was renting those premises?

A. Yes, sir.

Q. She told you where he had told her he worked?

A. I believe she said he worked at the mine some place.

Q. During that time she told you she didn't know anything about the still, moonshine or mash, didn't she? A. She did.

Q. She told you that O'Donnell had those rooms and she had nothing to do with them?

A. She said a man named O'Donnell rented those rooms.

Q. In what state of fermentation was that mash?

A. I would say it was ready to run through a still; a strong odor. [112]

Q. And how long would you say it takes fermentation to go to give off the odor?

A. All the way from eight to twelve days.

Q. The odor becomes strong when it's about ready for distillation? A. Yes, sir.

Q. Prior to that time it doesn't give out much odor?

A. When we got to the front door we could smell it.

(Testimony of Charles Rodda.)

Q. You have been searching for stills and mash for a good many years?

A. When we get a complaint.

Q. You have your sense of smell developed so you can detect such odor?

A. Yes, sir; I did at that place.

Mr. SLATTERY.—Objected to as calling for a conclusion.

The COURT.—He may answer.

Q. Well, you been searching and as you search for these illicit stills you have become acquainted with the odor and know what odor is?

A. Yes, sir.

Mr. SLATTERY.—Objected to as argumentative.

The COURT.—Sustained.

(By Mr. SLATTERY.)

Q. You say the odor was very strong?

A. Yes, sir.

Mr. SLATTERY.—The Government rests.

Whereupon the testimony was closed. [113]

The above and foregoing is all of the evidence offered and introduced and all of the testimony given on the trial of said cause.

That after the conclusion of the testimony as aforesaid, the case was argued by the United States Attorney and counsel for the defendant and thereafter the Court charged the jury and exceptions were taken to the charge by the defendant as follows: [114]

Charge to the Jury.

The COURT.—Gentlemen of the jury, in all these cases you will remember that you and I have a divided function and duty. Mine is to tell you what the law is that applies to the case and you always accept the law from the court; but your function and duty is to determine the truth where the facts are in dispute and where different inferences may be drawn. Remember while you take the law from me you don't take the facts from me. I might tell you out and out whether or not I think the defendant guilty, I may comment on witnesses and evidence, but even if I did it wouldn't bind you to come to the same conclusion nor would it be said to bring you to the Court's conclusion but only to help you to reason to a correct decision. The information in this case is in five counts and charges the defendant with various violations of the National Prohibition Act; that Act as you remember was passed pursuant to constitutional amendment in order to prevent the use of intoxicating liquor for beverage purposes. Whether we like it or not as long as it is written in the Constitution of the country and the law has been passed by Congress it is the duty of every decent man not only to obey it but especially when he is in the jury box to enforce it. When I say it's his duty, that does not mean that every time a man is charged you must convict him. This law is enforced like any other law; this defendant is charged and put on trial and the jury

hears the evidence, and if from it they are satisfied he is guilty as charged beyond a reasonable doubt they should convict him and if they are not so satisfied they should acquit him; and whichever verdict you render whether of conviction or acquittal if it's your honest judgment and conclusion you are enforcing this law. The violations charged are that he manufactured, the defendant, moonshine whiskey without a permit, in the first count; the second count is manufacture without making record; the third count is he possessed intoxicating liquor intending to use it in violation of the Prohibition Act; the fourth count is possessed property designed for the unlawful [115] making of whiskey; and the fifth count is he maintained a common nuisance in his premises in that intoxicating liquor was kept and manufactured contrary to the National Prohibition Act. The Act provides that no one can make intoxicating liquor without permit or record—there are still lawful ways to manufacture intoxicating liquor, lawful uses for it, but in order to guard against the unlawful ways of manufacture and unlawful use the law requires that makers get a permit. Defendant had no permit or if he had he would show it to you. So if there is no direct evidence of no permit it need not confuse you. Anyone who keeps that sort of stuff in his premises, under this law is maintaining a common nuisance. There are penalties for these offenses ranging from fine to a fine or imprisonment and a fine and imprisonment, depending upon the circumstances of the case. You are never to be influenced by the

punishment, that's for the Court. Avoid sympathy either one way or the other and perform your duty. In response to this information the defendant pleads not guilty. Under the law he is presumed to be innocent; that doesn't mean that you believe him innocent. It simply means that not knowing anything about it we presume he is innocent until he is proven guilty beyond a reasonable doubt. The burden is on the Government in every criminal case to prove the defendant guilty beyond a reasonable doubt before you are justified in finding him guilty. The defendant is never required to prove himself innocent. After all the question is not is he innocent, but is he proven guilty beyond a reasonable doubt. Remember another thing, the Government isn't bound to prove him guilty to an absolute certainty, not beyond all doubt, but only beyond any reasonable doubt. After reviewing the facts and circumstances and the direct testimony of the witnesses in the case you may have some doubt as to the guilt of the defendant but unless a doubt is reasonable in view of all the circumstances you are bound to find him guilty; at the same time you may have a doubt of his innocence but that does not enable you or [116] justify you to find him guilty unless you have no reasonable doubt of his guilt. A reasonable doubt may be defined after this fashion; if after you have reviewed all the evidence you do not have a judgment that persists in staying with you, that to a very high degree of probability the defendant is guilty, you have a reasonable doubt and must acquit him. On the other

hand if after reviewing all the evidence and circumstances your judgment persists that to a very high degree of probability the defendant is guilty you have no reasonable doubt and you are bound to convict him. When I say bound, Gentlemen, there is no compulsion from the Court or anyone; the only things binding upon you are your oath, duty, honor and conscience. You are officers of the Court as you sit there, sworn to perform your duty as honest and conscientious men. You are the exclusive judges of the weight of the testimony and credibility of the witnesses. You see the witnesses, you hear them and observe and take note of their attitude and demeanor. Are they frank and fair or inclined to conceal or distort or misrepresent; do they contradict themselves or are they contradicted by others whom you prefer to believe; are they contradicted by circumstances which so far appeal to your reason that you prefer to believe them rather than the direct statements of any number of witnesses; have they an interest in the case. Circumstances may speak truly where witnesses are testifying untruly. There is presumption that the witnesses speak the truth; in other words the jury may presume that though you may see reason to deny the benefit of that presumption to any witness. It may extend to the defendant, but never forget he is the defendant. He is the vitally interested person in the case; he is charged with a serious offense, consequences grave enough if he is convicted. In judging his credibility and that of his wife, whether their interest that has caused them to depart

from the truth to deceive you, to conceal the truth and to raise in your mind any reasonable doubt and secure a verdict of acquittal; whether they departed from the truth with that end in view is for your guarded [117] and serious consideration. The Court doesn't say they have; it says for you to decide if they have. The evidence in this case is practically all circumstantial; that is to say this—that while this unlawful accumulation of stills and liquor, moonshine, were found fairly at the door of the defendant and in his own house, no one saw him make the liquor, you have only the circumstances to prove whether it's his property and whether he made liquor; no one has testified he owned it or made it. The law is in respect to circumstantial evidence that where circumstances justify the belief in the minds of the jury that the defendant is guilty beyond a reasonable doubt they have a right to rely on those circumstances and find him guilty. On the other hand if in the light of these circumstances, taking a reasonable view of the whole case, of all the circumstances, and not attempting to avoid the duty of fair consideration, if all those circumstances are as consistent that he is innocent as that he is guilty, it would be your duty to find him not guilty. Now Gentlemen, as to evidence. The meter man goes there and asks to be admitted as he has a right to; he is met with an objection at the door and the reason for which he didn't know; you have heard the wife's statement as to why she didn't allow him; he says he stood there twenty minutes, she didn't say how long; he went away and he reports to the

officers; what he reports we are not interested in, but at any rate all go back together, and here comes the first contradiction between the officers and the wife; Rodda says he knocked and in a minute the witness came to the door. She testifies she sat in the kitchen with the baby and saw nobody or heard nobody until the officers came in the kitchen. Rodda said the officers looked through the door into this east side kitchen nearly opposite the west side of the kitchen, was standing half open or ajar to some extent and Rodda pushes it open and finds the still, intoxicating liquor, moonshine, and mash which Rodda says was fermenting and was ready to distill. [118] In these rooms no clothing, nothing to indicate occupancy other than a bed, no kitchen utensils, and nothing to show in the way of using for food, no trunk, no shoes or hats, just that bed in there with clothing upon it. While taking it out apparently nothing was said by his wife, no excitement so far as the evidence shows, didn't say anything, made no objections. But after getting it out she begins to ask about a search-warrant. She first testified she didn't and afterwards she said she didn't remember. The officers said she did. If defendant and his wife were not concerned, why wouldn't she be anxious to have it carried out instead of inquiring for a search-warrant? At that time after removing it had taken some little time, she first began to make an explanation and began to account for it by a man named O'Donnell who rented the rooms; next day the officers arrested the defendant. He testified that when they ar-

rested him was the first time he heard the still was there or the mash was there. Assuming that the still and mash were not his do you believe his wife didn't tell him when he came home that night or the day when it was carried out of the premises? Yet he says he hadn't heard of it until Rodda told him; he denies knowledge of still and mash in the premises, that they were rented by O'Donnell and he didn't know anything about it; hadn't smelled anything and produces witnesses whose testimony tends to show there was a man there named O'Donnell. Now, then, Gentlemen of the jury, if the defendant had no part in carrying on these operations there, he wouldn't be guilty merely because a tenant used the premises for these unlawful purposes. But you ask yourself whether it is not likely that this O'Donnell, if such a man existed, and it looks fairly reasonable that he did, and this defendant were in partnership in carrying on these operations; is it reasonable that a bootlegger and moonshiner would rent an apartment in the situation these were, having all appliances such as mash and still, having it in operation across the hall with children running around, unless he and the landlord or owner were jointly interested, [119] working together in violation of the law? You are not to be hoodwinked and bamboozled by anybody, not by unreasonable testimony if it is unreasonable. Remember the witnesses on either side can swear that black is white if they think they can cause you to credit it or to entertain a reasonable doubt, but you are not to be gulled. As my honored

predecessor Judge Knowles said, you are not to believe a thing is so simply because someone swears it's so, and if a witness testifies that down the street he saw an elephant climb a telephone pole, you are not bound to believe it's a fact, even though he shows you the pole. You determine the true and false no matter from what witness the evidence comes. Now Gentlemen of the jury, that's the case for you; you have heard it all; you are men of common sense and reason, draw upon your own experience, conceive what your own conduct would be if across your hallway from your kitchen door of your own home a tenant set up a moonshine outfit and make moonshine whiskey, would you know it, how long would you tolerate it? Isn't it the reasonable fact to assume that if there was such a man O'Donnell he and the defendant were in cahoots in carrying on that unlawful business? Before you can find defendant guilty of making, you must be satisfied from the circumstances that the liquor was made there by the defendant or someone associated with him. You have a right to conclude that he and O'Donnell were partners but the Court doesn't tell you you ought to so determine. As a matter of law the Court tells you the inference from the circumstances is warranted, but whether you will draw the inference depends upon your judgment entirely. The still and liquor were found there, you have a right to infer it was made there. The law will warrant you in it though the law doesn't say you are bound to. That's the case. Remember the defendant is presumed to be not guilty, presumed to be innocent;

and unless from the evidence and circumstances you believe him guilty beyond reasonable doubt of some of these charges you must acquit him. You might convict of some and acquit of others or convict of all or acquit of all. Unless you believe beyond a reasonable [120] doubt he is guilty as charged in one or more counts, you must acquit him; and on the other hand if you believe he is guilty as charged you will find him guilty. Has counsel any objections or exceptions to the instructions of the Court.

By Mr. BALDWIN.—The defendant excepts to that portion of the instruction by the Court in commenting upon the witness saying that the jury is not to be hoodwinked or bamboozled by such testimony; also to that portion of said instruction referring to defendant's witnesses, that the jury are not to be gulled by such testimony, as prejudicing the rights of the defendant, causing the jury to believe that the defendant would try to bamboozle and hoodwink, and prejudicial to his interests; also to that portion of the instruction of the Court where the Court says that the jury has a perfect right to infer that the defendant and O'Donnell were partners in that it is not based upon the evidence in the case, or law and error of the Court in this, that it is for the jury to determine from the facts whether there was in fact the existence of those facts necessary to a partnership between O'Donnell and the defendant in this case.

The COURT.—You remember, Gentlemen of the jury, these objections are not argumentative but

these are simply to save the record for the benefit of the defendant. [121]

That thereupon the jury retired in charge of a sworn bailiff to deliberate upon their verdict and later and on May 15, 1923, returned into open Court with their verdict, which after the title of court and cause, was in words and figures as follows:

“We, the jury in the above-entitled cause, find the defendant guilty in manner and form as charged in the information on file herein as to counts three, four and five and not guilty as to counts one and two.

HENRY WILLIAMS,
Foreman.”

And said verdict was thereupon received and filed of record in the above-entitled Court and cause.

That on May 16, 1923, sentence was rendered and judgment entered against the defendant as follows:

JUDGMENT.

“The United States Attorney with the defendant and his counsel present in Court. The defendant was thereupon duly informed by the Court of the nature of the charge against him as appears in counts 3, 4 and 5 of the information herein, and of his arraignment and plea of not guilty and of his trial and the verdict of the jury of guilty as to counts 3, 4 and 5 of the information. And the defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing

to the Court, thereupon the Court rendered its judgment as follows, to wit:

That whereas the said defendant having been duly convicted in this court of the offense of unlawfully having and possessing intoxicating liquor and property designed for the manufacture of intoxicating liquor intended for use in violation of the National Prohibition Act, and unlawfully maintaining a common nuisance in violation of the National Prohibition Act committed on the 18th day of April, 1922, at Butte, in the State and District of Montana, as [122] charged in counts 3, 4 and 5 of the information herein;

It is therefore considered, ordered and adjudged that for said offense, you, the said Anthony Carney, be confined and imprisoned in the county jail in Butte, Montana, for the term of seven months and that you pay a fine of Two Hundred Fifty Dollars and costs taxed at \$39.70, and that you be confined in said county jail until said fine is paid or you are otherwise discharged according to law.

Thereupon for good cause, court ordered that commitment herein be stayed for 24 hours pending the filing of a motion by defendant for a new trial.

Judgment rendered and entered May 16, 1923.

C. R. GARLOW,
Clerk.

By H. H. Walker,
Deputy."

That on May 17, 1923, the defendant duly served and filed his motion for new trial in the above-

entitled court and cause, said motion for new trial omitting the title of court and cause is as follows:

(Title of Court and Cause.)

Motion for New Trial.

Comes now the defendant in the above-entitled action and moves as follows:

I.

That the verdict of guilty on the third count contained in the information on file herein on May 15, 1923, be set aside and a new trial on said count of the information allowed on the grounds and for the reasons following:

1. That the charge contained in said count of said information does not state facts sufficient to constitute a public offense.

2. That the facts stated in said count of said information are not sufficient to show a violation of any criminal law of the United States of America.

3. That said third count of said information does not include any defensive negative averments or supply the want thereof [123] by stating "that the act complained of was then and there prohibited and unlawful" as required by Section 32 of the National Prohibition Act.

4. That because the charge contained in said count of said information does not state facts sufficient to constitute a public offense, the above-entitled court was and is without jurisdiction to try the defendant on the charge contained in said count of said information.

5. That because the facts stated in said count of said information are not sufficient to show a violation of any criminal law of the United States of America, the above-entitled court was and is without jurisdiction to try the defendant on the charge contained in said count of said information.

6. That because of the fact that said third count of said information does not include any defensive negative averments or supply the want thereof by stating "that the act complained of was then and there prohibited and unlawful," as required by Section 32 of the National Prohibition Act, the above-entitled court was and is without jurisdiction to try the defendant on the charge contained in said count of said information.

7. Errors in law occurring at the trial as follows:

The Court erred in overruling defendant's objections to the testimony given by the witness Rodda relating to conversations had by him with the defendant's wife in the absence of the defendant.

The Court erred in overruling defendant's objections to the testimony given by the witness Fairchild relating to conversations had by him with defendant's wife in the absence of the defendant.

The Court erred in admitting the testimony of the witness Rodda concerning statements to have been made by the defendant's wife concerning the necessity for and want of a search-warrant as the basis for searching the premises mentioned and described in the information herein. [124]

The Court erred in denying defendant's motion

for a directed verdict made at the conclusion of the Government's case.

The Court erred in making the comment that it did make in overruling defendant's motion for a directed verdict made at the conclusion of the Government's case.

The Court erred in submitting the charge contained in said count of said information to the jury.

8. While charging the jury, the Court erred as follows:

In its definition of a reasonable doubt.

In its statement of the law relating to the presumption of innocence.

In failing to tell the jury that the presumption of innocence is an instrument of proof created by law in favor of one accused of crime whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has thus created.

That this presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn.

That this legal presumption of innocence is to be regarded by the jury in every case as matter of evidence to the benefit of which the party charged with crime is entitled.

That the presumption of innocence is evidence in favor of the accused which must be borne in mind by the jury and considered by them with all of

the other evidence in the case in arriving at their verdict.

That the jury is bound to find according to the presumption of innocence unless after considering all of the evidence in the case together with that presumption, they are satisfied beyond a reasonable doubt that the defendant is guilty as charged.

In charging that the presumption of innocence is merely [125] a status created by law at the commencement of the trial.

That in failing to charge the jury that to overturn the presumption of innocence, there must be evidence of guilt carrying home a degree of conviction short only of absolute certainty.

In stating that a statement said to have been made by the defendant's wife in his absence, concerning the necessity of a search-warrant authorizing the searching of the premises described in the information herein, was an admission of guilty knowledge, from which the jury might infer that the defendant knew of, participated in, and was a party to the crime charged in said count of said information.

In stating that the evidence was such as to require the inference that the defendant was a partner with Joe O'Donnell in connection with the matters charged in said count of said information.

In stating that the evidence justified the inference that the defendant was a partner with Joe O'Donnell in connection with the matters charged in said count of said information.

That in stating that the jury had a perfect right to infer from the evidence that the defendant and Joe O'Donnell were partners in connection with the matters charged in said count of said information.

In stating that the defendant testified that he did not know anything about the search of the premises described in the information until he was told about it by the officers at the time they arrested him.

In arguing that because thereof the jury should view the testimony of the defendant with suspicion.

In using the word "bamboozled" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such as reasonably [126] to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were trying to deceive and impose upon the jury and to practice trickery and deception and had been guilty of perjury, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were trying to deceive and impose upon the jury and to practice trickery and deception and had been guilty of perjury and were not worthy of any credit whatsoever.

In using the word "hoodwinked" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such

as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were trying to deceive the jury as if by blinding, to blindfold the jury and to cover and conceal the true facts from the jury and had been guilty of perjury, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were trying to deceive the jury as if by blinding, to blindfold the jury and to cover and conceal the true facts from the jury and had been guilty of perjury, and were not worthy of any credit whatsoever.

In using the word "gulled" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the court, the witnesses for the defendant were endeavoring to treat the members of the jury as simple, credulous persons, easily tricked, and to make them the victims of trickery and deceit practiced by defendant's witnesses upon them, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were endeavoring to treat the members of the jury as simple, credulous [127] persons, easily tricked, and to make them the victims of trickery and deceit practiced by defendant's witnesses upon them, and were not worthy of any credit whatsoever.

In failing to state definitely the elements essential to the commission of the crime charged to have been committed in the third count of the information.

In failing to state that each of these elements must be proved to the satisfaction of the jury beyond a reasonable doubt before the defendant could be legally convicted of the crime charged in the third count of the information.

In failing to state to the jury what the Government was required to prove beyond a reasonable doubt before a verdict finding the defendant guilty on the charge contained in the third count of the information would be justified.

In charging generally on all of the counts contained in the information herein and definitely on none.

In submitting the charge contained in the third count of the information and the charge contained in the fifth count of the information for the reason that as a result thereof defendant was twice put in jeopardy for the same offense.

In failing to instruct the jury;

That circumstantial evidence should be acted upon with caution.

That before a conviction can properly be had on circumstantial evidence, all the essential facts must be consistent with the hypothesis of guilt as that to be compared with all the facts proved.

That the facts must exclude every other theory but that of guilt and that the facts must establish such a certainty of guilt of the accused as to con-

vince the judgment beyond a reasonable doubt that the accused is the one who committed the offense.

In failing to instruct the jury that where a conviction is sought solely upon circumstantial evidence, the criminatory circumstances proved must be consistent with each other and point [128] so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis.

In commenting as it did concerning the weight and effect to be given to the testimony of the defendant himself.

9. That the evidence is insufficient to justify the verdict of guilty on said count of said information for this:

That there is nothing in the evidence showing or tending to show to whom the liquor said to have been found in the premises described in the information herein, belonged.

That there is nothing in the evidence tending to show that the liquor mentioned in said count of said information belonged to the defendant.

That there is nothing in the evidence tending to show, how, when or by whom the liquor mentioned in said count of said information was put in the place where it is stated to have been found.

That there is nothing in the evidence tending to show that the defendant in this case was ever the owner of, in possession of, or in control of said liquor, or that he had any knowledge concerning its existence, or the place where it was kept.

That there is nothing in the evidence tending to show that if the liquor mentioned in said count of said information belonged to the defendant, he was not legally permitted to possess the same.

That unless it be conceded that the testimony given on the part of the defendant to the effect that the room in which the liquor mentioned in said count of said information was found, is true, and that the room in which said liquor is stated to have been found, had been rented to a person other than the defendant, there is nothing in the evidence tending to show that said liquor was not kept in defendant's private dwelling for the personal consumption of the defendant and his family residing in such dwelling and to his *bona fide* guests when entertained by him therein.

That if it be conceded that the testimony given on the [129] part of the defendant to the effect that the room in which the liquor mentioned in said count of said information was found is true, and that the room in which said liquor is stated to have been found, had been rented to a person other than the defendant, there is nothing in the evidence tending to show that the defendant had any knowledge of, title to, or control over such liquor.

That there is nothing in the evidence tending to show that the liquor mentioned in the third count of said information and stated to have been intended for use in violation of Title II of the National Prohibition Act was kept in the premises mentioned in said information or sale, barter or any other commercial purpose.

That there is nothing in the evidence tending to show that any intoxicating liquor had ever been sold, bartered or used for any commercial purpose in or on the premises described in the information herein or by the defendant at any time or place.

II.

That the verdict of guilty on the fourth count contained in the information on file herein on May 15, 1923, be set aside and a new trial on said count of the information allowed on the grounds and for the reasons following:

1. That the charge contained in said count of said information does not state facts sufficient to constitute a public offense.

2. That the facts stated in said count of said information are not sufficient to show a violation of any criminal law of the United States of America.

3. That because the charge contained in said count of said information does not state facts sufficient to constitute a public offense, the above-entitled court was and is without jurisdiction to try the defendant on the charge contained in said count of said information.

4. That because the facts stated in said count of said information are not sufficient to show a violation of any criminal law [130] of the United States of America, the above-entitled court was and is without jurisdiction to try the defendant on the charge contained in said count of said information.

7. Errors in law occurring at the trial as follows:

The Court erred in overruling defendant's objections to the testimony given by the witness Charles Rodda relating to conversations had by him with the defendant's wife in the absence of the defendant.

The Court erred in overruling defendant's objections to the testimony given by the witness Fairchild relating to conversations had by him with the defendant's wife in the absence of the defendant.

The Court erred in admitting the testimony of the witness Rodda concerning statements to have been made by the defendant's wife concerning the necessity for and want of a search-warrant as the basis for searching the premises mentioned and described in the information herein.

The Court erred in denying defendant's motion for a directed verdict made at the conclusion of the Government's case.

The Court erred in making the comment it did make in overruling defendant's motion for a directed verdict made at the conclusion of the Government's case.

The Court erred in submitting the charge contained in said count of said information to the jury.

8. While charging the jury, the Court erred as follows:

In its definition of a reasonable doubt.

In its statement of the law relating to the presumption of innocence.

In failing to tell the jury that the presumption of innocence is an instrument of proof created by

law in favor of one accused of crime whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has thus created.

That this presumption on the one hand, supplemented by any [131] other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn.

That this legal presumption of innocence is to be regarded by the jury in every case as matter of evidence to the benefit of which the party charged with crime is entitled.

That the presumption of innocence is evidence in favor of the accused which must be borne in mind by the jury and considered by them with all of the other evidence in the case in arriving at their verdict.

That the jury is bound to find according to the presumption of innocence unless after considering all of the evidence in the case together with that presumption, they are satisfied beyond a reasonable doubt that the defendant is guilty as charged.

In charging that the presumption of innocence is merely a status created by law at the commencement of the trial.

That in failing to charge the jury that to overturn the presumption of innocence, there must be evidence of guilt carrying home a degree of conviction short only of absolute certainty.

In stating that a statement said to have been made by the defendant's wife in his absence, con-

cerning the necessity of a search-warrant authorizing the searching of the premises described in the information herein, was an admission of guilty knowledge, from which the jury might infer that the defendant knew of, participated in, and was a party to the crime charged in said count of said information.

In stating that the evidence was such as to require the inference that the defendant was a partner with Joe O'Donnell in connection with the matters charged in said count of said information.

In stating that the evidence justified the inference that the defendant was a partner with Joe O'Donnell in connection with the matters charged in said count of said information. [132]

That in stating that the jury had a perfect right to infer from the evidence that the defendant and Joe O'Donnell were partners in connection with the matters charged in said count of said information.

In stating that the defendant testified that he did not know anything about the search of the premises described in the information until he was told about it by the officers at the time they arrested him.

In arguing that because thereof the jury should view the testimony of the defendant with suspicion.

In using the word "bamboozled" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such

as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were trying to deceive and impose upon the jury and to practice trickery and deception and had been guilty of perjury, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were trying to deceive and impose upon the jury and to practice trickery and deception and had been guilty of perjury and were not worthy of any credit whatsoever.

In using the word "hoodwinked" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were trying to deceive the jury as if by blinding, to blindfold the jury and to cover and conceal the true facts from the jury and had been guilty of perjury, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were trying to deceive the jury as if by blinding, to blindfold the jury and to cover and conceal the true facts from the jury and had been guilty of perjury, and were not worthy of any [133] credit whatsoever.

In using the word "gulled" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in

which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were endeavoring to treat the members of the jury as simple, credulous persons, easily tricked, and to make them the victims of trickery and deceit practiced by defendant's witnesses upon them, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were endeavoring to treat the members of the jury as simple, credulous persons, easily tricked, and to make them the victims of trickery and deceit practiced by defendant's witnesses upon them, and were not worthy of any credit whatsoever.

In failing to state definitely the elements essential to the commission of the crime charged to have been committed in the fourth count of the information.

In failing to state that each of these elements must be proved to the satisfaction of the jury beyond a reasonable doubt before the defendant could be legally convicted of the crime charged in the fourth count of the information.

In failing to state to the jury what the Government was required to prove beyond a reasonable doubt before a verdict finding the defendant guilty on the charge contained in the fourth count of the information would be justified.

In charging generally on all of the counts contained in the information herein and definitely on none.

In failing to instruct the jury:

That circumstantial evidence should be acted upon with caution.

That before a conviction can properly be had on circumstantial evidence, all the essential facts must be consistent with the hypothesis [134] of guilt as that is to be compared with all the facts proved.

That the facts must exclude every other theory but that of guilt and that the facts must establish such a certainty of guilt of the accused as to convince the judgment beyond a reasonable doubt that the accused is the one who committed the offense.

In failing to instruct the jury that where a conviction is sought solely upon circumstantial evidence, the criminatory circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis.

In commenting as it did concerning the weight and effect to be given to the testimony of the defendant himself.

9. That the evidence is insufficient to justify the verdict of guilty on said count of said information for this:

That there is nothing in the evidence showing or tending to show to whom the property, stated in said count of the information, to be designed for the manufacture of intoxicating liquor intended for use in violation of Title II of the National Prohibition Act, belonged.

That there is nothing in the evidence tending to show that the property mentioned in said count of said information belonged to the defendant.

That there is nothing in the evidence tending to show how, when or by whom the property mentioned in said count of said information was put in the place where it is stated to have been found.

That there is nothing in the evidence tending to show that the defendant in this case was ever the owner of, in possession of, or in control of said property, or that he had any knowledge concerning its existence, or the place where it was kept.

That it appears from the testimony that the room in which said property is stated to have been found had been rented to a person other than the defendant and there is nothing in the evidence tending to show that the defendant had any knowledge of, title to, or control [135] over such property.

That there is nothing in the evidence tending to show that said property had been used for the manufacture of any intoxicating liquor.

That there is nothing in the evidence tending to show that said property was ever used on the premises described in the information herein for the purpose of manufacturing any intoxicating liquor for sale, barter or any other purpose or otherwise or at all.

That there is nothing in the evidence tending to show that any intoxicating liquor had ever been sold, bartered or used for any commercial purpose in or on the premises described in the information herein or by the defendant at any time or place.

III.

That the verdict of guilty on the fifth count contained in the information on file herein on May 15,

1923, be set aside and a new trial on said count of the Information allowed on the grounds and for the reasons following:

1. That in so far as said count charges the maintenance of a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act is concerned, the charge contained in said count of said information does not state facts sufficient to constitute a public offense.

2. That in so far as said count charges the maintenance of a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act is concerned, the facts stated in said count of said information are not sufficient to show a violation of any criminal law of the United States of America.

3. That in so far as said count charges the maintenance of a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act is concerned, the fifth count of said information [136] does not include any defensive negative averments or supply the want thereof by stating "that the act complained of was then and there prohibited and unlawful" as required by Section 32 of the National Prohibition Act.

4. That because in so far as said count charges the maintenance of a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National

Prohibition Act, the same does not include any defensive negative averments or supply the want thereof by stating "that the act complained of was then and there prohibited and unlawful" as required by Section 32 of the National Prohibition Act, the above-entitled court was and is without jurisdiction to try the defendant on the charge contained in said count of said information, that he maintained a nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act.

5. That in so far as said count charges the maintenance of a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act is concerned, by their verdict of not guilty on the first and second counts contained in said information, the jury found the issue framed by defendant's plea of not guilty to the charge last mentioned in favor of the defendant, and the Government is now foreclosed from contending that the defendant was guilty of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act.

6. Errors in law occurring at the trial as follows:

The Court erred in overruling defendant's objection to the testimony given by the witness Rodda relating to conversations had by him with the defendant's wife in the absence of the defendant.

The Court erred in overruling defendant's objections to the [137] testimony given by the witness Fairchild relating to conversations had by him with defendant's wife in the absence of the defendant.

The Court erred in admitting the testimony of the witness Rodda concerning statements having been made by the defendant's wife concerning the necessity for and want of a search-warrant as the basis for searching the premises mentioned and described in the information herein.

The Court erred in denying defendant's motion for a directed verdict made at the conclusion of the Government's case.

The Court erred in making the comment that it did make in overruling defendant's motion for a directed verdict made at the conclusion of the Government's case.

The Court erred in submitting either of the charges contained in said count of said information to the jury.

7. While charging the jury, the Court erred as follows:

In its definition of a reasonable doubt.

In its statement of the law relating to the presumption of innocence.

In failing to tell the jury that the presumption of innocence is an instrument of proof created by law in favor of one accused of crime whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has thus created.

That this presumption on the one hand, supple-

mented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn.

That this legal presumption of innocence is to be regarded by the jury in every case as matter of evidence to the benefit of which the party charged with crime is entitled. [138]

That the presumption of innocence is evidence in favor of the accused which must be borne in mind by the jury and considered by them with all of the other evidence in the case in arriving at their verdict.

That the jury is bound to find according to the presumption of innocence unless after considering all of the evidence in the case together with that presumption, they are satisfied beyond a reasonable doubt that the defendant is guilty as charged.

In charging that the presumption of innocence is merely a status created by law at the commencement of the trial.

That in failing to charge the jury that to overturn the presumption of innocence, there must be evidence of guilt carrying home a degree of conviction short only of absolute certainty.

In stating that a statement said to have been made by the defendant's wife in his absence, concerning the necessity of a search-warrant authorizing the searching of the premises described in the information herein, was an admission of guilty knowledge, from which the jury might infer that

the defendant knew of, participated in, and was a party to the crime charged in said count of said information.

In stating that the evidence was such as to require the inference that the defendant was a partner with Joe O'Donnell in connection with the matters charged in said count of said information.

In stating that the evidence justified the inference that the defendant was a partner with Joe O'Donnell in connection with the matters charged in said count of said information.

That in stating that the jury had a perfect right to infer from the evidence that the defendant and Joe O'Donnell were partners in connection with the matters charged in said count of said information.

In stating that the defendant testified that he did not know anything about the search of the premises described in the [139] information until he was told about it by the officers at the time they arrested him.

In arguing that because thereof the jury should view the testimony of the defendant with suspicion.

In using the word "bamboozled" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the

defendant were trying to deceive and impose upon the jury and to practice trickery and deception and had been guilty of perjury, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were trying to deceive and impose upon the jury to practice trickery and deception and had been guilty of perjury and were not worthy of any credit whatsoever.

In using the word "hoodwinked" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were trying to deceive the jury as if by blinding, to blindfold the jury and to cover and conceal the true facts from the jury and had been guilty of perjury, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were trying to deceive the jury as if by blinding, to blindfold the jury and to cover and conceal the true facts from the jury and had been guilty of perjury, and were not worthy of any credit whatsoever.

In using the word "gulled" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection [140] in which it was brought out, were such as reasonably to lead the jury to believe that

in the opinion of the Court, the witnesses for the defendant were endeavoring to treat the members of the jury as simple, credulous persons, easily tricked, and to make them the victims of trickery and deceit practiced by defendant's witnesses upon them, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were endeavoring to treat the members of the jury as simple, credulous persons, easily tricked, and to make them the victims of trickery and deceit practiced by defendant's witnesses upon them, and were not worthy of any credit whatsoever.

In failing to state definitely the elements essential to the commission of the crime of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act.

In failing to state that each of these elements must be proved to the satisfaction of the jury beyond a reasonable doubt, before the defendant could be legally convicted of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act.

In failing to state definitely the element essential to the commission of the crime of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act.

In failing to state that each of these elements must be proved to the satisfaction of the jury beyond a reasonable doubt before the defendant could be legally convicted of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act. [141]

In failing to state to the jury what the Government was required to prove beyond a reasonable doubt, before a verdict finding the defendant guilty of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act would be justified.

In failing to state to the jury what the Government was required to prove beyond a reasonable doubt, before a verdict finding the defendant guilty of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act would be justified.

In charging generally on all the charges contained in the information herein and definitely on none.

In submitting the charge that defendant was guilty of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act, and the charges contained in the first and second counts of said information to the jury, for the reason that as a

result thereof, defendant was twice put in jeopardy for the same offense.

In failing to instruct the jury:

That circumstantial evidence should be acted upon with caution.

That before a conviction can properly be had on circumstantial evidence, all the essential facts must be consistent with the hypothesis of guilt as that is to be compared with all the facts proved.

That the facts must exclude every other theory but that of guilt and that the facts must establish such a certainty of guilt of the accused as to convince the judgment beyond a reasonable doubt that the accused is the one who committed the offense.

In failing to instruct the jury that where a conviction is sought solely upon circumstantial evidence, the criminatory circumstances [142] proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis.

In commenting as it did concerning the weight and effect to be given to the testimony of the defendant himself.

8. That the evidence is insufficient to justify a verdict of guilty on the charge that defendant maintained a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act for this:

That there is nothing in the evidence showing or tending to show to whom the liquor said to

have been found in the premises described in the information herein, belonged.

That there is nothing in the evidence tending to show that the liquor mentioned in said count of said information belonged to the defendant.

That there is nothing in the evidence tending to show how, when, or by whom the liquor mentioned in said count of said information was put in the place where it is stated to have been found.

That there is nothing in the evidence tending to show that the defendant in this case was ever the owner of, in possession of, or in control of said liquor, or that he had any knowledge concerning its existence, or the place where it was kept.

That there is nothing in the evidence tending to show that if the liquor mentioned in said count of said information belonged to the defendant, he was not legally permitted to possess the same.

That unless it be conceded that the testimony given on the part of the defendant to the effect that the room in which the liquor mentioned in said count of said information was found, is true, and that the room in which said liquor is stated to have been found, had been rented to a person other than the defendant, there [143] is nothing in the evidence tending to show that said liquor was not kept in defendant's private dwelling for the personal consumption of the defendant and his family residing in such dwelling and to his *bona fide* guests when entertained by him therein.

That if it be conceded that the testimony given on the part of the defendant to the effect that

the room in which the liquor mentioned in said count of said information was found is true, and that the room in which said liquor is stated to have been found, had been rented to a person other than the defendant, there is nothing in the evidence tending to show that the defendant had any knowledge of, title to, or control over such liquor.

That there is nothing in the evidence tending to show that the liquor mentioned in the fifth count of said information and stated to have been intended for use in violation of Title II of the National Prohibition Act was kept in the premises mentioned in said information for sale, barter, or any other commercial purpose.

That there is nothing in the evidence tending to show that any intoxicating liquor had ever been sold, bartered or used for any commercial purpose in or on the premises described in the information herein or by the defendant at any time or place.

9. That the evidence is insufficient to justify a verdict of guilty on the charge that defendant maintained a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act for this:

That by their verdict of not guilty on the first and second counts contained in the information herein, the jury found that no liquor had been manufactured at or within the premises mentioned

and described in the fifth count of said information.

That there is nothing in the evidence tending to show that any intoxicating liquor was ever manufactured at or within the premises mentioned and described in said count of said information. [144] That there is nothing in the evidence tending to show to whom any property contained in the premises mentioned in said count of said information which could have been used for manufacturing intoxicating liquor in violation of Title II of the National Prohibition Act belonged.

That there is nothing in the evidence tending to show that any property of any kind stated to have been used in said premises for the purpose of manufacturing intoxicating liquor in violation of Title II of the National Prohibition Act belonged to the defendant.

That there is nothing in the evidence tending to show how, when or by whom any property stated to have been found in the premises described in said count of said information which could have been used for the manufacture of intoxicating liquor in violation of Title II of the National Prohibition Act was put in the place where it is stated to have been found.

That there is nothing in the evidence tending to show that the defendant in this case was the owner of, in possession of, or in control of any property stated to have been found in the premises described in said count of said information, which could have been used for manufacturing in-

toxicating liquor in violation of Title II of the National Prohibition Act, or that he had any knowledge concerning its existence or the place where it was kept or the purpose for which it could be used.

That if the evidence proved that the defendant had knowledge or reason to believe that his room, house or building was occupied or used for keeping liquor contrary to any provision of Title II of the National Prohibition Act, and suffered the same to be so occupied or used, such evidence is insufficient to justify the conviction of the defendant on the charge of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act, as charged in the fifth count of the information herein. [145]

That if the evidence proved that the defendant had knowledge or reason to believe that his room, house or building was occupied or used for keeping liquor contrary to any provision of Title II of the National Prohibition Act, and suffered the same to be so occupied or used, such proof would not justify the infliction of any penalty upon or punishment of the defendant other than that the room, house or building so occupied or used should be subject to a lien for and might be sold to pay all fines and costs assessed against the person guilty of maintaining a common nuisance in said room, house or building for such violation, and that any such lien might be enforced by any court having

jurisdiction as provided in the concluding sentence of Section 21 of the National Prohibition Act.

That if the evidence proved that the defendant had knowledge or reason to believe that his room, house or building was occupied or used for the manufacture of liquor contrary to any provision of Title II of the National Prohibition Act, and suffered the same to be occupied or used, such evidence is insufficient to justify the conviction of the defendant on the charge of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act, as charged in the fifth count of the information herein.

That if the evidence proved that the defendant had knowledge or reason to believe that his room, house or building was occupied or used for the manufacture of liquor contrary to any provision of Title II of the National Prohibition Act, and suffered the same to be so occupied or used, such proof would not justify the infliction of any penalty upon or punishment of the defendant other than that the room, house or building so occupied or used should be subject to a lien for and might be sold to pay all fines and costs assessed against the person guilty of maintaining a common nuisance in said room, house or building for such violation, and that any such lien might be enforced by any court having jurisdiction as provided in the [146] concluding sentence of Section 21 of the National Prohibition Act.

10. That it appears from the uncontradicted testimony of the government's witnesses, Rodda and Fairchild, that the affidavit made by them and presented to the court by the United States Attorney, at the time he requested leave to file the information in the above-entitled court and cause, which affidavit is the sole basis on which the discretion of the Court to grant the request of the United States Attorney for leave to file said information is based, was false and not according to the fact in many material respects, as a result of which:

The United States Attorney was mislead;

The Court was asked to and did exercise its discretion in authorizing the filing of said information upon an entirely erroneous conception of the facts; and

The defendant was required to plead to and stand trial on an information improperly filed and without proper basis in law.

And upon the true facts appearing, the Court should have annulled its order granting leave to file the information on file in the above-entitled court and cause and dismissed the action.

11. That the statements contained in said affidavit and not shown by the testimony of the Government's witnesses, Rodda and Fairchild, to have been false, were not sufficient to justify the United States Attorney in requesting leave to file said information or to authorize the court in the exercise of its discretion, to have granted such request, as a result of which:

The United States Attorney was mislead;

The Court was asked to and did exercise its discretion in authorizing the filing of said information upon an entirely erroneous conception of the facts; and

The defendant was required to plead to and stand trial on an information improperly filed and without proper basis in law.

Each of these motions is based and will be presented on [147] the records, files and minute entries in the above-entitled court and cause, the minutes of the court therein, and a bill of exceptions to be hereafter prepared, served, settled and filed.

WHEELER & BALDWIN,
Attorneys for Defendant.

Service of the above and foregoing motion for new trial acknowledged and copy thereof received at Butte, Montana, May 17, 1923.

JOHN L. SLATTERY,
United States Attorney for the District of Montana.

Filed May 17, 1923.

That thereafter and on the day last mentioned, said motion for new trial was by order of the court, duly made and entered of record, set for hearing on May 21, 1923, at 9:30 o'clock in the morning.

That on May 21, 1923, at 9:30 o'clock in the morning said motion for new trial came duly and regularly on for hearing in open court, the defendant appearing by J. H. Baldwin, one of his attorneys, and the District Attorney being pres-

ent and appearing for the United States. Thereupon the Court stated that it did not care to hear oral arguments and permitted the defendant to file a written brief and said motion was thereupon submitted to the Court and taken under advisement.

That on May 22, 1923, herein the Court order that the defendant's motion for new trial heretofore submitted be and the same was thereupon denied, whereupon counsel for defendant asked for and was granted an exception to the ruling of the Court denying defendant's said motion for new trial.

That by orders thereafter duly made, signed, filed and entered of record in the above-entitled court and cause, the defendant herein was granted to and including June 25, 1923, in which to prepare and serve his proposed bill of exceptions on the proceedings had on the trial of the above-entitled cause and his proposed bill [148] of exceptions on the order and ruling of the Court denying his motion for new trial herein.

And now, within the time allowed by said orders, the defendant serves the above and foregoing as his proposed bill of exceptions on the proceedings had on the trial of the above-entitled cause and on the order and ruling of the court denying his motion for new trial, and asks that after due proceedings had, the same be settled, approved, allowed, signed, ordered filed, filed, and entered of record in the above-entitled court and cause as his bill of exceptions on the proceedings had on the trial

of the above-entitled cause and the order and ruling of the Court denying his motion for new trial therein.

WHEELER & BALDWIN,
Attorneys for Defendant.

Service of the above and foregoing Proposed Bill of Exceptions acknowledged and copy thereof received at Great Falls, Montana, June 18, 1923.

JOHN L. SLATTERY,
United States Attorney for the District of Montana.

Settled and allowed as true and complete, this July 6, 1923.

BOURQUIN,
J.

Filed July 6, 1923. C. R. Garlow, Clerk. [149]

And thereafter on June 20, 1923, an order enlarging the time within which to file the record and docket the case with the Clerk of the United States Circuit Court of Appeals was entered herein, which order is of record as follows, to wit:

In the District Court of the United States for the
District of Montana.

No. 921.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANTHONY CARNEY,
Defendant.

Order Extending Time to and Including August 30, 1923, to File Record and Docket Cause.

On motion of the defendant and plaintiff in error in the above-entitled cause and for good cause shown;

IT IS ORDERED AND THIS DOES ORDER that the time to file the record thereof and docket the case with the Clerk of the United States Court of Appeals at San Francisco, California, be and the same is hereby enlarged and said defendant and plaintiff in error is hereby granted to and including Aug. 30, 1923, to file the record thereof and docket the case with the Clerk of said Circuit Court of Appeals at San Francisco, California.

Done at Great Falls, Montana, June 20, 1923.

BOURQUIN,
Judge.

And thereafter on May 28, 1923, bond of the defendant was filed herein, which bond is entered of record as follows, to wit: [150]

In the District Court of the United States for the
District of Montana.

No. 921.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANTHONY CARNEY,
Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS that we, Anthony Carney, as principal and Thomas Healy and Delia Gannon as sureties, all of Butte, Montana, are held and firmly bound unto the United States of America, in the full and just sum of One Thousand Dollars (\$1,000.00) good and lawful money of the United States of America, to be paid to the said United States of America, for which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally firmly by these presents.

Sealed with our seals and dated at Butte, Montana, this 26th day of May, 1923.

THE CONDITION of the above ~~obligation~~ is such that:

WHEREAS on May 16, 1923, judgment and sentence was rendered, pronounced and entered against the defendant Anthony Carney in the above-entitled court, in the above-entitled cause, and

WHEREAS said defendant has been granted a writ of error for the purpose of having said judgment and sentence reviewed in and reversed by the United States Circuit Court of Appeals for the Ninth Circuit, and

WHEREAS it has been ordered that such writ shall operate as a stay of proceedings under said sentence, and

WHEREAS a citation directed to the United States of America, [151] citing and admonishing

the United States of America to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, in the State of California, thirty days from and after the date of said citation.

NOW THEREFORE if the said Anthony Carney shall prosecute his writ to effect and make his plea good and answer all damages and costs and abide the judgment of said United States Circuit Court of Appeals for the Ninth Circuit, and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the term of said Circuit Court of Appeals to which said writ of error shall be returnable, and from day to day thereafter during said term, and from term to term and from time to time until finally discharged therefrom, and shall not depart without leave of Court, and shall abide and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of said judgment and sentence against which said writ of error has been sued out, as said Court may direct, if said judgment and sentence of the said District Court against him shall be affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void, otherwise to remain in full force and effect.

ANTHONY CARNEY. (Seal)

THOMAS HEALY. (Seal)

DELIA GANNON. (Seal)

United States of America,
State of Montana,
County of Silver Bow,—ss.

Thomas Healy, being first duly sworn on his oath deposes and says: that he is one of the parties named as sureties in and whose names are subscribed to the above and foregoing bond; that he is a citizen of the United [152] States, more than twenty-one years of age and a resident freeholder in Silver Bow County, Montana; that he is worth the sum of One Thousand Dollars (\$1,000.00) over and above all his just debts and liabilities in property subject to execution and sale and that his property consists of lots 4 and 5, block 2, Hornet Addition to Butte, with one four room modern house and one five room modern house thereon and lots 18 and 19, block 3 of the Kenwood Addition to Butte, Montana.

THOMAS HEALY.

Subscribed and sworn to before me May —, 1923.

[Seal] JAMES H. BALDWIN,
Notary Public for the State of Montana, Residing
at Butte, Mont.

My commission expires Apr. 30, 1925.

United States of America,
State of Montana,
County of Silver Bow,—ss.

Delia Gannon, being first duly sworn on her oath deposes and says: that she is one of the parties

named as sureties in and whose names are subscribed to the above and foregoing bond; that she is a citizen of the United States, more than twenty-one years of age and a resident freeholder in Silver Bow County, Montana; that she is worth the sum of One Thousand Dollars (\$1,000.00) over and above all her just debts and liabilities in property subject to execution and sale and that her property consists of the west 30 feet of lot 5, block 2, of the Original Townsite of the city of Butte, Montana, with six-room modern house thereon.

DELIA GANNON.

Subscribed and sworn to before me May 26th. 1923.

[Seal] JAMES H. BALDWIN,
Notary Public for the State of Montana, Residing
at Butte, Mont.

My commission expires Apr. 30, 1925.

Filed May 28, 1923. C. R. Garlow, Clerk. [153]

And thereafter on August 17, 1923, praecipe for certified copy of record was filed herein, which praecipe is entered of record as follows, to wit:

In the District Court of the United States, District
of Montana, Butte Division.

No. 921.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,
vs.

ANTHONY CARNEY,
Defendant and Plaintiff in Error.

Praeceptum for Transcript of Record.

To John L. Slattery, Esq., United States Attorney for the District of Montana, attorney for the plaintiff and defendant in error above named, and Charles R. Garlow, Clerk of the above-entitled court:

You and each of you will please take notice that the undersigned attorneys for the defendant and plaintiff in error above named hereby serve upon you and each of you this praecipe to indicate to you the portions of the record and files of the above-entitled court and cause which defendant and plaintiff in error desires to and will incorporate in his transcript of the record on the writ of error issued herein on May 28, 1923, to have the judgment hereinbefore rendered and entered herein, reviewed by the Circuit Court of Appeals for the Ninth Circuit, and the Clerk of said District Court will incorporate and include in said transcript and certify the following:

1. The information.

2. The affidavits of Charles Rodda and Sam Fairchild, subscribed and sworn to before F. J. Dallman, Deputy Collector of Internal Revenue on May 9, 1922, and May 24, 1922, respectively, and filed in the above-entitled court and cause on May 26, 1922. [154]

3. The minute entry of May 26, 1922, showing the proceedings had at the time of the making of request for the filing of the information herein and

the order of the Court allowing the filing of said information.

4. The minute entry of May 29, 1922, showing the arraignment of the defendant on and his plea of not guilty to the charge contained in said information.

5. The verdict of the jury which was returned and filed in the above-entitled court and cause on May 15, 1923, with the filing mark endorsed thereon.

6. The minute entry of May 15, 1923, showing the receipt of said verdict and the setting of the time for passing sentence and judgment.

7. The minute entry of May 16, 1923, showing the proceedings had at the time of the passing of sentence and judgment on that day.

8. The judgment of the Court which was rendered and entered in the above-entitled court and matter on May 16, 1923.

9. The motion for new trial which was served and filed in the above-entitled court and cause on May 17, 1923, together with the admission of service attached thereto and the filing mark endorsed thereon.

10. The minute entry of May 21, 1923, showing the proceedings had in the above-entitled court and cause on that day in connection with the calling of said motion for new trial for hearing and the action taken in connection therewith.

11. The minute entry of May 22, 1923, showing the order of the Court denying the motion for new trial and granting time to sue out writ of error.

12. The petition for writ of error which was served and filed on May 28, 1923, together with the admission of service attached thereto and the filing mark endorsed thereon.

13. The assignment of errors which was served and filed on [155] May 28, 1923, together with the admission of service attached thereto and the filing mark endorsed thereon.

14. The prayer for reversal which was served and filed on May 28, 1923, together with the admission of service attached thereto and the filing mark endorsed thereon.

15. The order allowing the writ of error which was signed and filed on May 28, 1923, with the filing mark endorsed thereon.

16. The writ of error issued on May 28, 1923, with the admission of service attached thereto and the filing mark endorsed thereon.

17. The citation issued on May 28, 1923, with the admission of service attached thereto and the filing mark endorsed thereon.

18. The minute entry of May 28, 1923, showing the filing of the petition for writ of error and all of the proceedings had thereon.

19. The bill of exceptions which was signed, filed and entered of record on the 6th day of July, 1923, together with the admission of service endorsed thereon and the order settling, approving and allowing the same and the filing mark endorsed on said bill of exceptions.

20. The order of June 20, 1923, enlarging time to file record and docket case with the Clerk of

the United States Circuit Court of Appeals at San Francisco, California, to and including August 30, 1923.

21. The bond of the defendant and plaintiff in error and last copy of this praecipe.

22. Copy of this praecipe.

WHEELER & BALDWIN,

Attorneys for Defendant and Plaintiff in Error.

Service of the above and foregoing praecipe for certified transcript of record acknowledged and copy thereof received at Butte, Montana, August 17, 1923.

W. H. MEIGS,

Asst. United States Attorney for the District of Montana.

Filed August 17, 1923. C. R. Garlow, Clerk.
[156]

In the District Court of the United States in and
for the District of Montana.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Montana,—ss.

I. C. R. Garlow, Clerk of the United States District Court in and for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 157 pages numbered consecutively from one

to 157, inclusive, is a true and correct transcript of the pleadings, process, records, orders, judgment and all other proceedings had in said cause and of the whole thereof, as appears from the original records and files of said court in my custody and control; and I do further certify and return that I have annexed to said transcript, and included within said paging, the original citation and writ of error.

I further certify that the cost of the transcript of record is the sum of Fifty-three and 40/100 Dollars (\$53.40), and that the same has been paid.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said court, at Butte, Montana, this 23d day of August, A. D. 1923.

[Seal]

C. R. GARLOW,
Clerk.

By L. R. Polglase,
Deputy Clerk. [157]

[Endorsed]: No. 4084. United States Circuit Court of Appeals for the Ninth Circuit. Anthony Carney, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed August 27, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States for the
District of Montana.

No. 921.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANTHONY CARNEY,
Defendant.

**Order Extending Time to and Including August 30,
1923, to File Record and Docket Cause.**

On motion of the defendant and plaintiff in error
in the above-entitled cause and for good cause
shown;

IT IS ORDERED AND THIS DOES ORDER
that the time to file the record thereof and docket
the case with the Clerk of the United States Court
of Appeals at San Francisco, California, be and
the same is hereby enlarged and said defendant
and plaintiff in error is hereby granted to and in-
cluding August 30, 1923, to file the record thereof
and docket the case with the Clerk of said Circuit
Court of Appeals at San Francisco, California.

Done at Great Falls, Montana, June 20, 1923.

BOURQUIN,
Judge.

[Endorsed]: No. 4084. United States Circuit
Court of Appeals for the Ninth Circuit. Order
Under Subdivision 1 of Rule 16 Enlarging Time
to and Including August 30, 1923, to File Record
and Docket Cause. Filed Jun. 26, 1923. F. D.
Monckton, Clerk. Refiled Aug. 17, 1923. F. D.
Monckton, Clerk.

No. 4084.

United States Circuit Court of Appeals 5
FOR THE NINTH CIRCUIT.

ANTHONY CARNEY,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the United States District Court
of the District of Montana.

**WHEELER & BALDWIN,
BUTTE, MONTANA,**

Attorneys for Plaintiff in Error.

Filed October....., 1923.

.....
Clerk.



OATES & ROBERTS, PRINTERS, BUTTE

No. 4084.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ANTHONY CARNEY,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

*Proceedings Had at the Time of the Filing of the
Information.*

On May 26, 1922, JOHN L. SLATTERY, as United States Attorney for the District of Montana, appeared in the District Court of the United States for the District of Montana, the Honorable George M. Bourquin, Judge presiding, and asked leave to file an information against the plaintiff in error charging him with having violated the National Prohibition Act in several particulars. The Information was verified by the United

States Attorney on information and belief and is found at pages 2 to 5 of the record.

At the time the request for leave to file the Information was made, the United States Attorney filed and presented to the court two joint affidavits made by Chas. Rodda and Sam Fairchild (R. pp. 6 to 8). These affidavits are as follows:

In the District Court of the United States, in and for the District of Montana.

Butte, Montana, April 29, 1922.

UNITED STATES

vs.

ANTHONY CARNEY.

Affidavits of Chas. Rodda and Sam Fairchild.

Chas. Rodda and Sam Fairchild, being first duly sworn according to law, depose and say:

That they are duly appointed, qualified and acting police officers of the city of Butte, Montana, and were such on the 18th day of April, 1922.

That during day of April 18, 1922, man known to them as Fred Bolton, and employed by the Montana Gas Co., came to them and complained that at certain premises, 205 W. Quartz St., Butte, Montana, he was refused admission to premises, for the purposes of reading gas meter.

That they went with man to premises 205 W. Quartz St., and upon entering noticed a very strong odor of mash, that upon investigation they discovered 75 gallon mash, in a state of fermentation, a quantity of white moonshine whiskey, one 12 gallon still and connections.

That they then arrested Anthony Carney, and brought him to Police Station. Anthony Carney being owner of premises, occupying same, and having full control of same.

Sample of mash and whiskey turned over to the Federal Prohibition Department at Butte, Mont., together with still and connections.

CHARLES RODDA,
SAM FAIRCHILD.

Subscribed and sworn to before me this 9th day of May, 1922.

F. J. DALLMAN,
Deputy Collector of Internal Revenue.

Filed May 26, 1922. C. R. Garlow, Clerk.

In the District Court of the United States, in and for the
District of Montana.

United States of America,
District of Montana—ss.

AFFIDAVIT.

Charles Rodda and Sam Fairchild, after each being first duly sworn, upon his oath, according to law, deposes and says as follows, to-wit:

That they are duly appointed, qualified and acting police officers of the city of Butte, Montana, and were such on the 18th day of April, 1922;

That while engaged in the dispatch of their official duties they were at those premises situated at 205 West Quartz Street, in the city of Butte, and found therein a 12 gallon still, together with the equipment used in

connection with the operation of the same, set up and in operation, and also found Anthony Carney in charge of the said premises engaged in the operation of the said still, and in the manufacture of intoxicating liquors.

CHARLES RODDA.

SAM FAIRCHILD.

Subscribed and sworn to before me this 24th day of May, 1922, Butte, Montana.

F. J. DALLMAN,

Deputy Collector U. S. I. R. S.

Filed May 26, 1922. C. R. Garlow, Clerk.

Thereafter, and on the date last mentioned, an Order authorizing the filing of the Information was made and entered of record (R. pp. 8 to 9).

At the time the request for leave to file the information was made and leave to file the same was granted, nothing tending to show probable cause to believe that a violation of the National Prohibition Act, as charged in the information, had been committed by anyone, or that any violation of the National Prohibition Act had been committed by the plaintiff in error other than the statements contained in said affidavits, was offered or introduced, and no evidence of any kind tending to show probable cause to believe that a violation of the National Prohibition Act as charged in said information had been committed by anyone or that any violation of the National Prohibition Act had been committed by Anthony Carney, the plaintiff in error, other than the statements contained in said affidavits, was offered or

introduced, and in granting leave to file said information, the court acted solely on the proof contained in said joint affidavits of Chas. Rodda and Sam Fairchild (R. p. 75).

The Information.

The Information contains five counts.

In the First Count it is charged that on or about the 18th day of April, 1922, the plaintiff in error, at and within certain premises situated at 205 West Quartz Street, in the city of Butte, in the State and District of Montana, "did then and there wrongfully and unlawfully manufacture intoxicating liquor, to-wit: moonshine whiskey, the exact character and quantity of which is to informant unknown, without then and there obtaining a permit from the commissioner of internal revenue so to do."

In the Second Count, it is charged that at the same time and place, the plaintiff in error did "wrongfully and unlawfully manufacture intoxicating liquor to-wit: moonshine whiskey, the exact character and quantity of which is to the informant unknown, without making at the time, a permanent record of such manufacture showing in detail the amount and kind of liquor manufactured and the time and place of manufacture."

In the Third Count, it is charged that at the same time and place, plaintiff in error did wrongfully and unlawfully have and possess intoxicating liquor intended for use in violation of Title II of the National Prohibition Act."

In the Fourth Count, it is charged that at the same

time and place, the plaintiff in error "did wrongfully and unlawfully have and possess property designed for the manufacture of intoxicating liquor intended for use in violation of Title II of the National Prohibition Act.

In the Fifth Count, it is charged that at the same time and place, the plaintiff in error "wrongfully and unlawfully maintained a common nuisance, that is to say, a place and building where intoxicating liquor was kept and manufactured in violation of Title II of the National Prohibition Act."

Arraignment.

On May 29, 1922, the plaintiff in error appeared in court, was arraigned and entered a plea of not guilty (R. p. 9).

The Trial.

The case came regularly on for trial on May 15, 1923. Fred Bolton, Chas. Rodda and Sam Fairchild were sworn and testified on behalf of the Government and thereupon the Government rested. (R. pp. 76 to 91.)

During the course of the examination of the witness, Bolton, the following proceedings were had. After testifying that on or about April 18, 1922, he went to a residence at 205 West Quartz Street, in the city of Butte, for the purpose of inspecting gas meters, he was allowed over the objection of the plaintiff in error to testify to certain transactions had and statements made in the absence of the plaintiff in error (R. pp. 76 to 80).

During the course of the examination of the witness Chas. Rodda, he was allowed to testify over the objection of the plaintiff in error to certain transactions had

and statements made in the absence of the plaintiff in error (R. pp. 81 to 84). And while testifying on his direct examination, this witness stated that the joint affidavits made by the witness and Sam Fairchild and hereinbefore referred to contains statements which were not true and on the statement of the United States Attorney that he was taken by surprise by this testimony, the court allowed the United States Attorney to impeach the witness (R. pp. 86 to 87).

During the course of the direct examination of the witness, Sam Fairchild, it was made to appear that statements contained in the joint affidavits of the witness and Chas. Rodda, hereinbefore referred to, were false, and the witness was impeached by the government while attempting to prove its case (R. pp. 90-91).

At the conclusion of the examination of the witness Fairchild, plaintiff in error moved for a directed verdict. This motion was denied and in denying the motion, and in the presence of the jury, the court used the following language:

"The evidence is enough to hang a man if he was on trial for murder." Exception was duly saved. (R. p 91.)

After the motion for directed verdict was overruled, Mrs. Anthony Carney, the wife of the plaintiff in error, Mrs. Gannon, Wm. Colmar, Martin Walsh, Joe Nevin and the plaintiff in error, were sworn and testified on behalf of the plaintiff in error (R. pp. 92 to 122).

Thereafter, the witness, Chas. Rodda was recalled by the Government, and over the objection of the plaintiff

in error, was permitted to testify to certain statements said to have been made by Mrs. Carney in the absence of the plaintiff in error.

The Testimony.

The testimony on the part of the government was entirely circumstantial. It appeared from the testimony of each of the witnesses testifying for the government that the entire transaction concerning which they testified, occurred in the absence of the plaintiff in error; that the house in which the liquor, mash and still were stated to have been found, was a double house fitted up for house keeping by two families; that the portions of the house thus fitted up were separated from each other by a hall which extended through the entire length of the building, and that the Carneys lived in the portion of the house across the hall from that portion of the house in which the liquor, mash and still were stated to have been found.

The witness, Rodda also stated that it appeared that the portion of the premises in which the liquor, mash and still were found were being used (R. p. 85), and that at the time the officers searched the premises, Mrs. Carney stated to them that the portion of the building in which the liquor, mash and still were found, were then rented to and used by a man named O'Donnell, and denied that she had any knowledge of or information concerning the use that he was making of the premises or that the liquor, mash or still were kept there (R. pp. 123 to 124). This witness further testified that he arrested the plaintiff in error on the day

after the liquor, mash and still were found. The plaintiff in error stated that the portion of the building in which the articles last mentioned had been found, were rented to another man and that plaintiff in error denied operating the still or knowledge concerning the same (R. pp. 85 and 86).

Charge to the Jury.

While charging the jury, the court made the following statements:

"The evidence in this case is practically all circumstantial, that is to say this—that while this unlawfully accumulation of stills and liquor and moonshine was found fairly at the door of the defendant and in his own house, no one saw him make the liquor. You have only the circumstances to prove whether it's his property and whether he made liquor; no one has testified he owned it or made it." (R. p. 130.)

And further, when referring to the testimony of the plaintiff in error concerning his arrest and the use of the premises in which the liquor, mash and still were found, and the testimony of other witnesses concerning the use of those premises by someone other than the plaintiff in error, as follows:

"Yet he says he hadn't heard of it until Rodda told him; he denies knowledge of still and mash in the premises; that they were rented by O'Donnell and he didn't know anything about it; hadn't smelled anything and produces witnesses whose testimony tends to show that there was a man there named O'Donnell. Now, then, Gentlemen of the jury, if the defendant had no part in

carrying on these operations there, he wouldn't be guilty merely because a tenant used the premises for these unlawful purposes. But you ask yourself whether it is not likely that this O'Donnell, if such a man existed, and it looks fairly reasonable that he did, and this defendant were in partnership in carrying on these operations; is it reasonable that a bootlegger and moonshiner would rent an apartment in the situation these were, having all appliances such as mash and still, having it in operation across the hall with children running around, unless he and the landlord or owner were jointly interested, working together in violation of the law? You are not to be hoodwinked and bamboozled by anybody, not by unreasonable testimony if it is unreasonable. Remember the witnesses on either side can swear that black is white if they think they can cause you to credit it or to entertain a reasonable doubt, but you are not to be gulled. As my honored predecessor Judge Knowles said, you are not to believe a thing is so simply because someone swears it's so, and if a witness testifies that down the street he saw an elephant climb a telegraph pole, you are not bound to believe it's a fact, even though he shows you the pole. You determine the true and false no matter from what witness the evidence comes. Now, Gentlemen of the jury, that's the case for you; you have heard it all; you are men of common sense and reason, draw upon your own experiences, conceive what your own conduct would be if across your hallway from your kitchen door of your own house a tenant set up a moonshine outfit and make moonshine whiskey,

would you know it, how long would you tolerate it? Isn't it the reasonable fact to assume that if there was such a man O'Donnell he and the defendant were in cahoots in carrying on that unlawful business?" (R. pp. 130 to 133.)

Plaintiff in error excepted to portions of the charge to the jury. (R. p. 134.)

The trial was concluded on May 15, 1923, and on that day the jury returned into court with their verdict by which they found the plaintiff in error "not guilty" on the charges contained in counts one and two of the Information, and "guilty" in manner and form as charged in counts three, four and five thereof (R. p. 135).

On May 16, 1923, judgment was rendered and sentence passed and it was then and there ordered and adjudged that the plaintiff in error be confined and imprisoned in the county jail at Butte, Montana, for the term of seven months and that he pay a fine of Two Hundred Fifty Dollars (\$250.00) and costs taxed at Thirty Nine and 70-100 Dollars (\$39.70) and be confined in said county jail until said fine was paid or he was otherwise discharged according to law (R. pp. 135-136).

Thereafter, plaintiff in error served and filed his motion for new trial (R. pp. 137 to 169).

The Motion for New Trial came on for hearing on May 21, 1923. Thereupon the court stated that it did not care to hear oral arguments but permitted the plaintiff in error to file a written brief and the Motion was taken under advisement. On the following day the court

ordered that the motion for new trial be denied, to which ruling of the court plaintiff in error asked for and was granted an exception (R. pp. 169-170).

Thereafter plaintiff in error served and filed his Petition for Writ of Error (R. pp. 50 to 52), Assignment of Errors (R. pp. 52 to 63), and Prayer for Reversal (R. pp. 63 to 64), and an Order allowing Writ of Error was duly signed, served and filed (R. pp. 64 to 66), and Writ of Error and Citation were duly issued, signed, served and filed (R. pp. 66 to 70).

SPECIFICATION OF ERRORS RELIED ON.

1. The court was without authority to grant the request of the United States Attorney for leave to file the Information filed in this case.

2. The affidavits on which the request for leave to file the Information in this case was granted, were not sufficient to move the discretion of the court or to authorize it to grant leave to file the Information filed in this case.

3. The plaintiff in error was improperly arrested, called for trial and tried.

4. The court erred in proceeding with the trial after it appeared from the testimony of the witnesses Rodda and Fairchild on whose affidavits leave to file the Information filed herein was granted, while testifying as witnesses for the Government, on their direct examination, that the affidavits made by them and on which the order granting leave to file the Information was based, were false.

5. The court erred in not withdrawing its leave to file

the Information filed herein and in failing to dismiss the action when it appeared from the testimony of the witnesses Rodda and Fairchild, while testifying on behalf of the Government, that the statements contained in their affidavits on which the court acted in granting leave to file the Information herein, were false.

6. The statements contained in said affidavits and not shown by the testimony of the Government's witnesses, Rodda and Fairchild, to have been false, were not sufficient to justify the United States Attorney in requesting leave to file the Information herein or to authorize the court in the exercise of judicial discretion, to have granted such request, as a result of which it appears on the face of the record that the plaintiff in error was improperly arrested and called for trial in violation of the provisions of the Fourth and Fifth Amendment to the Constitution of the United States of America.

7. The charge contained in the Third Count of the Information herein, is insufficient in law for this:

That the charge contained in said count does not state facts sufficient to constitute a public offense.

That the facts stated in said count are not sufficient to show a violation of any criminal law of the United States of America.

That said count does not include any defensive negative averments or supply the want thereof by stating "that the act complained of was then and there prohibited and unlawful" as required by Section 32 of the National Prohibition Act.

8. The court erred in overruling the objection of plaintiff in error to the testimony given by the witness Fred Bolton concerning statements made by the wife of plaintiff in error and transactions had in the absence of plaintiff in error.

9. The court erred in overruling the objection of plaintiff in error to the testimony given by the witness Rodda relating to conversations had by him with the wife of the plaintiff in error and transactions had in the absence of the plaintiff in error.

10. The court erred in denying the motion of the plaintiff in error for a directed verdict made at the close of the Government's case.

11. The court erred in stating in the presence of the jury at the time the motion of the plaintiff in error for a directed verdict was denied that "the evidence is enough to hang a man if he was on trial for murder."

12. There is no substantial evidence in this case sustaining the charge contained in the Third Count of the Information herein.

13. There is no substantial evidence in this case sustaining the charge contained in the Fourth Count of the Information herein.

14. There is no substantial evidence in this case sustaining the charge contained in the Fifth Count of the Information herein.

15. The Court erred in its charge to the jury.

16. The Court erred in denying the motion of the plaintiff in error for a new trial.

ARGUMENT.

Specifications of Errors One, Two and Three.

These specifications all relate to the same matters, involve the same facts and require the application of the same principles of law, and will be taken up together.

The contention of the plaintiff in error is that as a result of the filing of the charges contained in the Information filed in the case at bar, on the showing made in the affidavits filed in support of the request for leave to file the Information, he was improperly brought into court and has been deprived of his liberty and property without due process of law. This contention is based upon certain guarantees contained in the Federal Constitution.

The Fifth Amendment of the Federal Constitution provides that no person shall be deprived of life, liberty or property without due process of law.

While it is true as stated by the authorities, that no precise definition of the phrase "due process of law" can be given, yet the courts have frequently defined the phrase in general terms.

As generally held, due process of law means "law in the regular course of administration through courts of justice according to those rules and forms which have been established for the protection of private rights:

6 R. C. L. p. 434.

It includes all the steps essential to deprive a person of life, liberty or property and requires that all the forms and acts essential to its application and to give it effect, be met. The means that may be employed to accomplish

the purpose of the law is the process. In other words, the process is the mode by which the purpose of the law may be effected:

6 R. C. L. p. 436.

The requirement of due process of law was the result of ages of experience and was established as an essential element of human right long prior to the Revolution in this country and was preserved and guaranteed to the people of this country by the Fifth Amendment to the Constitution of the United States which acts as a limitation upon the powers of the National Government:

6 R. C. L. p. 440.

As applied to judicial proceedings, due process of law means a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial, and requires a course of proceeding according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights, and that any prosecution brought shall be brought and conducted according to the prescribed forms and solemnities for ascertaining guilt:

12 C. J. pp. 1190 to 1192.

The provisions embodying this guaranty have received a broad and liberal interpretation. The guaranty is always and everywhere present to protect the citizen against interference with his rights. The term law as used in this guaranty embraces all legal and equitable rules defining human rights, liberties and duties and providing for their enforcement, not only as between man and man, but also between the state and the citi-

zens and the protection extends to the rights of liberty and property in the very broadest sense of the term:

6 R. C. L. p. 436.

The requirement of due process of law extends to every case of the exercise of governmental power and the Government may not, by its agencies, legislative, judicial or executive, disregard the constitutional prohibition. When any right is acquired by a person under the existing law, there is no power in any branch of the Government, to take it away except in the manner prescribed by the Constitution, that is, by due process of law. The purpose of this clause is to exclude arbitrary power from every branch of the Government and it acts as a restraint on the legislative, executive, and the judicial departments of the Government:

6 R. C. L. pp. 444, 445.

The want of due process of law may arise either:

1. From the fact that the law attempted to be enforced is void, or
2. That the forms of law have not been observed:

12 C. J. 1196.

The term "liberty" is used in this constitutional guaranty in a broad sense as including all personal as distinguished from property rights:

12 C. J. 1199.

In criminal cases, due process of law, requires a law creating or defining the crime, a court of competent jurisdiction, accusation presented in the proper manner, notice and opportunity to answer the charge, trial according to the settled course of judicial proceedings

and a right to be arrested only after compliance with the legal requirements authorizing the making of the arrest and the right to be discharged, unless after proceeding had in due legal form, the party charged with violating the law, has been found guilty according to law:

12 C. J. 1202.

The law has established certain tribunals with defined powers and forms of procedure for the arrest and trial of persons charged with crime. Security to the defendant in criminal cases and to the public is only found in a strict compliance with the forms and methods prescribed by law. Jurisdiction comes from following the law, disorder and uncertainty follow a departure therefrom. Neither the prosecution nor the defendant by any act of their own, can change or modify the law by which original prosecutions are controlled. Such prosecutions involve public wrongs, and a breach of public rights, and duties which affect the community, considered as a community, in its social and aggregate capacity. The end they have in view is the prevention of similar offenses, not atonement or expiation for a crime committed. The penalties or punishments for the enforcement of which they are a means to that end are not within the discretion or control of the party accused, for no one has a right, by his own voluntary act, to surrender his liberty. The state, the public have an interest in the preservation of the liberties of the citizen and will not allow them to be taken away without due process of law. Criminal prosecutions proceed on the assumption of such a forfeiture, which to sustain them,

must be ascertained and declared as the law prescribes. The party charged with crime must be brought into court and the trial must be had by the tribunals and in the mode which the constitution and Laws provide without any essential change. The court, the officer prosecuting for the people and the party charged with crime, are each and all entirely without authority to proceed or consent to any proceeding being had in any criminal prosecution except under the conditions and in the manner prescribed by the constitution and statutes:

Territory v. Ah Wah, 4 Mont. 149, 170-171;

Lewis v. U. S. 146, U. S. 370; 36 L. ed. 1011;

Hopt v. Utah, 110 U. S. 578, 28 L. ed. 264.

In the first case cited, by agreement between the state and the defendant then on trial for murder, the case was tried by and submitted to a jury consisting of eleven men. A conviction followed and the verdict and judgment were set aside on the ground that the defendant had been deprived of a right guaranteed to him by the Constitution—the right to trial by jury.

In the last two cases cited, it appeared that the defendant was not personally present throughout the proceeding on the trial of a felony case. Conviction was had in both cases, and the verdicts and judgments were reversed for the reason that the law requiring the personal presence of the defendant at each step taken during the trial of a criminal case was not complied with.

In neither of these cases did it appear that the defendant had objected to proceedings being had in his absence.

In the case of *Lewis v. U. S.* *supra*, the Supreme Court of the United States used the following language:

"We are of the opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view, as well as of the relations which the accused holds to the public as of the end of human punishment. The natural life, said Blackstone, "cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority." (1 Bl. Com. 133.) The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings, involving the deprivation of life or liberty, cannot be dispensed with or affected by the consent of the accused, much less by his mere failure when on trial and in custody to object to any unauthorized methods."

(146 U. S. 374, 36 L. Ed. 1013.)

In each of the cases cited above, the prosecution was commenced in a court having jurisdiction and in the manner prescribed by law, but there was a failure during

the course of the trial to comply strictly with some constitutional or statutory provision supposed to have been made for the protection of the liberty of the defendant.

In the case at bar, the same principles would necessarily apply, though the position of the plaintiff in error here is based upon a failure to meet the requirements of a constitutional provision intended for his protection at the very threshold of the proceeding.

The constitutional provision referred to is the Fourth Amendment to the Constitution of the United States, which provides that "no warrant shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the person or thing to be seized."

The warrant is the process by which the defendant is brought into court for the purpose of having his guilt or innocence of the crime charged determined and unless the conditions precedent to the issuance of a warrant as prescribed by the Constitution are complied with, it follows logically that the warrant was illegally issued and the defendant improperly brought into court to stand trial and tried for the reason that there has been a failure to proceed according to the forms and in the manner prescribed by law. In other words, there has been a want of due process of law in the case.

It is true that under the Federal Practice now in vogue, all crimes which are not infamous, may be prosecuted either by indictment or by information:

Section 1022 Revised Statutes; 2 Fed. Stat. Ann.
Sec. ed. 675.

However, either of these methods presupposed an examination of witnesses, who have personal knowledge of the facts concerning which they testify and a determination by a duly authorized tribunal of the question as to whether or not, on the facts legally proven, there is probable cause to believe that a crime defined by the Laws of the United States has been committed, and that the party charged and for whose arrest the warrant is asked committed that crime, for under the constitutional provision last referred to, a Federal Court has no jurisdiction to direct the issuance of a warrant on an information verified on the information and belief of the United States Attorney alone, but the application for leave to file the Information and for a warrant for the arrest of the accused person must be supported by proof under oath given as the law requires by someone having personal knowledge of the facts showing probable cause for belief that a crime has been committed and that the accused is guilty of the commission thereof:

U. S. v. Smith, 40 Fed. 755;

U. S. v. Baumert, 179 Fed. 735;

U. S. v. Morgan, 222 U. S. 274, 282; 56 L. ed 198, 200.

In the case last cited, in speaking of the rights of a defendant charged by information with crime, the Supreme Court of the United States said:

“He cannot be tried on an information unless it is supported by the oath of someone having knowledge of the facts showing the existence of probable cause.”

So as the Information filed in this case is verified by the United States Attorney on information and belief (R. p. 5) the trial court was entirely without jurisdiction to authorize the filing of the Information filed herein in the absence of other proof or the filing of an Information containing any charge excepting charges for which probable cause was shown by the affidavits presented to the court for its consideration at the time the request for leave to file the Information was made and upon which the court acted in granting that request.

On the record in the case at bar, it appears that the United States Attorney acted upon this view of the law, for at the time the request for leave to file the Information was made by him, he filed with the clerk and presented to the court the affidavits of Chas. Rodda and Sam Fairchild hereinbefore set out. The portions of these affidavits material here are as follows:

"That they went with man to premises 205 W. Quartz St., and upon entering noticed a very strong odor of mash, that upon investigation they discovered 75 gallon mash, in a state of fermentation, a quantity of white moonshine whiskey, one 12 gallon still and connections.

"That they then arrested Anthony Carney, and brought him to Police Station. Anthony Carney being owner of premises, occupying same, and having fully control of same." (R. pp. 6 and 7.)

"That while engaged in the dispatch of their official duties they were at those premises situated at 205 West Quartz Street, in the city of Butte, and found therein

a 12 gallon still, together with the equipment used in connection with the operation of the same, set up and in operation, and also found Anthony Carney in charge of the said premises engaged in the operation of the said still, and in the manufacture of intoxicating liquors." (R. pp. 7 and 8.)

It seems clear that these statements are not sufficient to show probable cause for belief that at the time and place mentioned in the Information the plaintiff in error unlawfully had and possessed intoxicating liquor intended for use in violation of Title II of the National Prohibition Act as charged in the Third Count of the Information herein or that at that time and place the plaintiff in error had and possessed property designed for the manufacture of intoxicating liquor intended for use in violation of Title II of the National Prohibition Act as charged in the Fourth Count of the Information or that at the time and place mentioned, the plaintiff in error maintained a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act as charged in the Fifth Count of the Information.

It will be observed that these charges are based upon the provisions of Section 25 and 21 of the National Prohibition Act.

So far as it is material here, Section 25 of the National Prohibition Act provides that it shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title.

The Third Count of the Information is based upon a supposed unlawful possession by the plaintiff in error of liquor intended for use in violation of Title II of the National Prohibition Act.

The Fourth Count of the Information is based upon a supposed possession by the plaintiff in error, of property designed for the manufacture of liquor intended for use in violation of Title II of said Act.

Section 21 of the National Prohibition Act, upon which the Fifth Count of the Information is based, so far as it is material here, is as follows:

“Any room, house, building, boat, vehicle, structure or place where intoxicating liquor is * * kept * * in violation of this Title is hereby declared to be a common nuisance.”

The words with which the word “kept” are immediately associated in this section of the statute last referred to are such that they plainly mean “kept for sale or barter or other commercial purpose;” in other words, for the purpose and with the intent of violating Title II of the National Prohibition Act:

Street v. Lincoln Safe Deposit Company, 254,
U. S. 88, 92; 65 L. Ed. 151, 153.

It has always been the law unless otherwise provided by statute, that to convict one of crime, requires proof of intention to commit crime:

Norwitz v. U. S. 282 Fed. 575, 578.

Mere possession of intoxicating liquor or of property designed for the manufacture of intoxicating liquor is not made unlawful for by the sections of the statute

above referred to the unlawfulness declared is conditioned upon the intended use of intoxicating liquor possessed, kept or intended to be manufactured:

Street v. Lincoln Safe Deposit Company, *supra*.

And possession to be incriminating must be personal and exclusive:

Willsman v. U. S. 286, Fed. 852.

So on the statute, the material matter for consideration is not whether the plaintiff in error possessed intoxicating liquor or property designed for the manufacture of intoxicating liquor or kept intoxicating liquor, but what was the intent of the plaintiff in error with reference to the intoxicating liquor and property designed for the manufacture of intoxicating liquor referred to in Counts 3, 4 and 5 of the Information herein.

It follows that unless it appears from the statements contained in the affidavits above referred to and set out:

1. That the plaintiff in error was in the personal and exclusive possession of intoxicating liquor and that he intended to use that intoxicating liquor in violation of Title II of the National Prohibition Act, there was no sufficient showing of probable cause to believe the plaintiff in error guilty of the offense charged in the third count of the Information herein, and the trial court was without jurisdiction to authorize the filing of an information charging the offense attempted to be charged in that count.

2. That the plaintiff in error was in the personal and exclusive possession of property designed for the manufacture of intoxicating liquor intended for use in

violation of Title II of the National Prohibition Act, there was no sufficient showing of probable cause to believe the plaintiff in error guilty of the offense charged in the Fourth Count of the Information herein and the trial court was without jurisdiction to authorize the filing of an Information charging the offense attempted to be charged in that Count, and

3. That the plaintiff in error was in the personal and exclusive possession of a building where intoxicating liquor was kept for sale or barter or other commercial purpose in violation of Title II of the National Prohibition Act, there was no sufficient showing of probable cause to believe the plaintiff in error guilty of the offense charged in the Fifth Count of the Information herein, and the trial court was without jurisdiction to authorize the filing of an Information charging the offense attempted to be charged in that count.

The position of plaintiff in error is that these essential elements necessary to jurisdiction to authorize the filing of an Information containing the charges contained in Counts 3, 4 and 5 of the Information herein, are not proven by the affidavits on which the trial court acted in the case at bar.

The burden was on the Government to prove that the plaintiff in error had the specific intent involved in these charges or to show facts from which it might logically be presumed.

16 C. J. 529.

We concede that criminal intent being a state of mind is rarely susceptible of direct proof and that usually it

can only be shown as an inference from facts testified to by witnesses and that the inference may within proper limits be drawn from facts legally proved.

However, it is settled law that criminal intent cannot be inferred unless such intent is reasonably deducible from the circumstances proved, that no other intent is inferable therefrom and that the circumstances proved are not consistent with the absence of criminal intent:

16 C. J. pp. 773 and 774.

These requirements as to the essential elements of proof necessary to establishing probable cause are not met by the statements contained in the affidavits filed in support of the application for leave to file the Information in this case.

It is not suggested in either of these affidavits that any intoxicating liquor had ever been sold by the plaintiff in error or anyone else in the premises mentioned in the affidavits or elsewhere. Neither is there anything in either of these affidavits showing that the premises in which the liquor and property are stated to have been found, were fitted up in any way for the sale or other commercial disposition of intoxicating liquor, nor that said premises were or ever had been a place of public resort or contained any of the things necessary to the disposition of intoxicating liquor by sale or in any other way contrary to any provision of the National Prohibition Act. Nor is it directly stated, nor can it be logically inferred from the statements contained in these affidavits that the plaintiff in error was in the personal or

exclusive control of the supposed incriminating evidence.

While on the other hand, even if it is conceded for the sake of argument that the liquor stated to have been found belonged to the plaintiff in error, which is not the fact, it is not an unreasonable inference that in this arid age he might have had it for his own personal use and without any intent to sell or barter the same or use it for any commercial purpose in violation of any provision of the National Prohibition Act. It will be observed that the quantity of liquor found is not stated in either affidavit.

Further, if it be conceded for the purpose of argument, that it appears from the affidavits under discussion that the plaintiff in error was in the personal and exclusive control of the mash and still mentioned in the affidavits, which is not the fact, it would not follow that these circumstances reasonably required the deduction that they were designed for the manufacture of intoxicating liquor intended for use in violation of Title II of the National Prohibition Act, or that no inference other than that he intended to use them for the manufacture of intoxicating liquor intended to be used in violation of Title II of the National Prohibition Act, could reasonably be drawn therefrom, or that possession of the mash and still was not consistent with the absence of criminal intent.

It is not unreasonable to suppose that a man might be in possession of these things with the intent of using them for the manufacture of intoxicating liquor in-

tended for his own personal use. That men have, during all time, manufactured intoxicants for personal consumption is a matter within the knowledge of all men of experience, and in this day of private stills and home brew, it is just as reasonable to suppose on the circumstances shown, that the person who owned the mash and still intended to use them for the purpose of manufacturing intoxicating liquor for his own personal use as it is to infer that he intended to manufacture it for the purpose of selling it to others.

It should also be borne in mind in this connection, that all of the presumptions of law were in favor of the innocence of the plaintiff in error and that this presumption applies to the element of intent as well as to every other element essential to showing probable cause to believe him guilty of an offense under the Federal Law.

The result is that as the affidavits upon which leave to file the Information in this case, was granted, did not state facts showing probable cause for believing that the offenses charged in the third, fourth and fifth counts of the Information had been committed or that the plaintiff in error was the one who had committed those offenses, the affidavits were not sufficient to move the discretion of the court or to authorize it to grant leave to file an Information charging the plaintiff in error with the commission of the offenses charged in those counts of the Information, and the plaintiff in error was improperly arrested, called for trial and tried thereon.

Specifications of Error Four, Five and Six.

These specifications involve but a single question—The duty of the court when it appeared from the testimony of the witnesses, Rodda and Fairchild, who made the affidavits on which leave to file the Information herein was granted, while testifying for the Government that the statements contained in those affidavits were not true.

The material portions of the affidavits made by these witnesses and used by the United States Attorney in support of his application, for leave to file the Information filed herein were as follows:

“That they went with man to premises 205 W. Quartz St., and upon entering noticed a very strong odor of mash, that upon investigation they discovered 75 gallon mash, in a state of fermentation, a quantity of white moonshine whiskey, one 12 gallon still and connections.

“That they then arrested Anthony Carney, and brought him to Police Station. Anthony Carney being owner of premises, occupying same, and having full control of same.” (R. pp. 6 and 7.)

“That while engaged in the dispatch of their official duties they were at those premises situated at 205 West Quartz Street, in the city of Butte, and found therein a 12 gallon still, together with the equipment used in connection with the operation of the same, set up and in operation, and also found Anthony Carney in charge of the said premises engaged in the operation of the said still, and in the manufacture of intoxicating liquors.” (R. pp. 7 and 8.)

From the testimony given by all of the witnesses tes-

tifying on behalf of the Government or otherwise, it appeared that these statements contained in the affidavits were false.

From the testimony of the witness, Bolton, it appeared that the house in which the liquor, still and mash were found, was a double house with two kitchens and that the liquor, mash and still were found in the kitchen on the east side of the house (R. p. 78); that during the time the officers were there, no one other than a lady with whom witness was unacquainted, was in the premises and that she was on the west side of the house (R. p. 79); that the witness went all through the house with the officers and that the plaintiff in error was not in the house (R. p. 80).

From the testimony of the witness, Rodda, it appeared that he went to the premises described in the information with officer Fairchild and Mr. Bolton; that the house is a large house with a hallway dividing the house into two parts; that the rooms on the east side of the hallway were fitted up for house keeping and the rooms on the west side of the hallway were also fitted up for housekeeping; that the liquor, mash and still were found in the rooms on the east side of the hallway; that it appeared that the rooms on the east side of the house were being used; that when the officers entered the building Mrs. Carney was found in the kitchen on the west side of the hallway and that the Carneys lived on that side of the building; that the plaintiff in error himself was not in the building at any time while the officers were there and that he was not arrested until the

evening of the following day; that at the time the officers were in the building, Mrs. Carney stated to them that the rooms on the east side of the building were rented to and used by a man named O'Donnell and told them where he worked and that when the plaintiff in error was arrested he stated that the rooms were rented to O'Donnell and that plaintiff in error had no control over the same and knew nothing of their contents or what was being done in them (R. p. 81 to 86).

This witness also testified that the affidavits on which the application for leave to file the Information was based, were not drawn up according to the report turned in by the officers; that at the time the officers were in the building, the plaintiff in error was not there and that the portion of the affidavit in which it is stated that the officers found the still set up and in operation and found the plaintiff in error in charge of the premises engaged in the operation of the still and in the manufacture of intoxicating liquors was not true. (R. p. 87.)

And as a result of the denial by this witness of the truth of the statements contained in the affidavits on which the order of the court granting leave to file the Information was based, the court permitted the United States Attorney to impeach him. (R. p. 86.)

The witness Fairchild stated that at the time the officers went to the premises involved in this case they found a lady in the kitchen on the west side of the hallway; that the liquor, mash and still were found in the rooms on the east side of the hallway; that the lady did not accompany anyone into the rooms where the

liquor, mash and still were found and that the plaintiff in error was not on the premises at the time the officers were there. (R. pp. 89 to 91.)

When the attention of this witness was particularly called to that portion of the affidavit in which it was stated that the officers found the defendant, Anthony Carney in charge of the premises engaged in the operation of the still and in the manufacture of intoxicating liquors, the witness stated that he did not have a chance to read the affidavit and signed it without reading it and made an effort to explain his conduct in making a false affidavit. (R. p. 90.)

From this testimony it clearly appears that the portion of the affidavits in which it is stated that the officers "then arrested Anthony Carney and brought him to Police Station" and that Anthony Carney was the owner of the premises occupying the same and "having full control of the same" and that when the officers entered the premises involved in this case, they "found therein a 12 gallon still together with the equipment used in connection with the operation of the same set up and in operation and also found Anthony Carney in charge of the said premises engaged in the operating of the said still and in the manufacture of intoxicating liquors" were false.

The contention of the plaintiff in error is that the statements contained in these affidavits not shown by the testimony of the Government's witnesses, Bolton, Rodda and Fairchild to be false, were not sufficient to justify the United States Attorney in requesting leave

to file the Information herein or to authorize the court in the exercise of judicial discretion to grant such request as a result of which it appears on the face of the record that the plaintiff in error was improperly arrested and called for trial in violation of the provisions of the Fourth and Fifth Amendment to the Constitution of the United States of America, and that upon this condition appearing, the trial court erred in not withdrawing its leave to file the Information filed herein and in failing to dismiss the action and in proceeding with the trial of the case and finally submitting it to the jury for decision.

If that portion of the affidavits above set out and stated by these witnesses to be untrue, is disregarded, there is absolutely nothing in the record which could, by any theory of logical reasoning, be held to show probable cause for belief that the plaintiff in error was guilty of any crimes charged in the Information herein or held sufficient to confer jurisdiction on the trial court to grant leave to file the Information or authorize the issuance of a warrant directing the arrest of the plaintiff in error on any of those charges or to require him to proceed to trial in the case.

When the true condition was made to appear to the court on the record the court should have secured the plaintiff in error in those rights guaranteed to him by the Constitution of the United States and should have revoked its former leave to file the Information herein and by proper order should have set aside all the subsequent proceedings:

State v. Brett, 16 Mont. 360, 364;

State v. Cain, 16 Mont. 561.

These cases were both decided by the Supreme Court of a state in which the right of the court to grant leave to file an information upon motion of a county attorney is authorized by the Constitution, granted by the statute, and confirmed by numerous decisions and the facts from which the court draws its conclusions that such leave should be granted, need not be embodied in the application therefor it being sufficient if reasons satisfactory to the court are presented, whatever may be the form or manner of their presentation and in which it is not required that a statement should be made to the court of any of the evidence upon which the state will rely for a conviction:

Section 8, Article III, Constitution of Montana;
Secs. 11798, 11617, 11624 and 11625, R. C. M.
1921;

State v. Buckovich, 61 Mont. 480, 491;

State v. Martin, 29 Mont. 273, 275;

State ex rel Donovan v. District Court, 26 Mont.
275, 279.

In the case of State v. Brett, *supra*, Mr. Justice Hunt, speaking for the Supreme Court of the State of Montana, in referring to the protection of the rights of a person charged with crime with reference to matters leading up to the filing of an Information, used the following language:

“Where no examination had been had before a magistrate and no commitment has been made, in

such case, to protect the rights of the defendant, and to guard him against oppression or malice, and to prevent abuse of any general power vested in the county attorney, leave of the district court is necessary to be obtained. Thus, again, there is the guaranty that a judicial order will be required before there can even be a charge preferred. It is suggested that obtaining of a leave of the court is a mere perfunctory matter, and is granted of course. This argument, if true, reflects credit upon the several county attorneys of the state for having administered their offices with that high sense of impartial responsibility and power imposed upon them by the constitution, but it loses its entire force if an instance should arise where a prosecuting officer oppressively, maliciously or otherwise illegally should attempt to unjustly harass any citizen by filing an information charging him with crime. At once, upon proper showing, or doubtless by order of the court of its own motion, where the court should believe that a wrong was about to be done, the leave of the court would be suspended or denied, until an inquiry could be had into the reasons for the official acts of the county attorney in filing the information, and until the court was satisfied by the showing made that the case was one where an information should be filed." (16 Mont. 360-364.)

In the case of *State v. Cain*, *supra*, it appeared that by leave of court first obtained, the County Attorney of

Granite County filed an Information against the defendant Cain, a member of the Board of County Commissioners, charging him with having corruptly and extorsively taken and received a warrant. After the filing of the Information, the defendant moved to set it aside because at the time the Information was filed and leave of court was asked by the County Attorney the County Attorney had made no statement to the court of the evidence or reason upon which the same was based. The motion was supported by an affidavit which was to the effect that the County Attorney, when he asked leave to file the Information, made no statement to the court and gave no information to the court which he may have had and upon which he based the information or his belief that the defendant was guilty of the offense charged, nor did the court inquire into the matter at all, nor was the court informed in any manner or at all at the time of the filing of the Information of any facts which had come to the knowledge of the County Attorney or to the knowledge of anybody and which had caused the County Attorney to file the Information against the defendant. The affidavit further stated that it appeared by the report of the Grand Jury that at the March term of said court, a grand jury had made an examination, as appears from their report, of the offices of the County Commissioners of Granite County and into the conduct of the officers of the county commissioners during the year 1893, and that said Grand Jury failed to indict the said George B. Cain for any offense whatever. It further appeared from the record that at the time the Coun-

ty Attorney asked leave to file the Information against the defendant, the report of the Grand Jury which had been made in March, preceding the filing of the Information, was on file with the Clerk of the District Court of Granite County. By this report the Grand Jury found that the defendant had illegally been paid monies for inspecting the jail and sewer. No indictment was presented. The excess of payment was the basis of the criminal charge contained in the Information subsequently filed for extortion. The court sustained the motion to dismiss the Information and ordered the defendant discharged and his bondsmen exonerated. The state duly excepted and appealed from the decision and judgment.

In affirming the judgment of the trial court in that case, Mr. Justice Hunt again speaking for the Supreme Court of the State of Montana, used the following language:

“The affidavit of W. B. Rodgers was sufficient to have warranted the court in refusing leave to permit an information to be filed against the defendant until some showing was made by the county attorney for charging the defendant with a crime based upon the identical acts into which a grand jury had inquired, but for the doing of which they had failed to find a true bill. The fact that the information was already on file when these facts were brought to the attention of the court cannot affect the right of the court to revoke the leave already granted. If the court, in the exer-

cise of its sound judicial discretion, had a right to withhold its leave to file the information at all until inquiry could be had, under the limitations discussed in the Brett case, *supra*, it had a right to revoke its leave, where the defendant, directly after his arrest, and at the first opportunity presented, brought to the notice of the court the fact that his conduct had already been investigated by a grand jury, and no true bill had been found. Such was the effect of the defendant's motion. It brought to the attention of the court matters upon the presentation of which the court, in its discretion, and for apparent good cause, suspended its approval to file the information, by revoking its former leave, and setting aside the subsequent proceedings. The record discloses no request thereafter by the county attorney to file another information, and no attempt on his part to demonstrate to the court that the case was a proper one for further prosecution." (16 Mont. 563, 564.)

The principles applied in the cases last cited, finds support in theory in the decision of the United States Supreme Court in the case of *Silverthorn Lumber Co. v. U. S.* 251 U. S. 385, 390; 64 L. Ed. 319, 321.

In this connection we wish to state that we do not wish to be understood as suggesting that the United States Attorney intended to, or would present knowingly, to the court an affidavit which contained statements that were false, our position being, that it affirmatively appears on the record as made by the Government, that

the affidavits made by the witness Van Orden and Fairchild and presented to the court by the United States Attorney at the time he requested leave to file the information, were false, and not according to the facts, as a result of which:

The United States Attorney was misled.

The court was asked to and did exercise its discretion in granting leave to file said information and directing the issuance of a warrant for the arrest of the defendant, upon an entirely erroneous conception of the facts; and

The defendant was arrested and brought into court and required to plead to and stand trial on an information later proven by the government itself to have been improperly filed and without proper basis in law.

And that, for the protection of the public, the United States Attorney, the defendant, and itself, the court erred in not revoking its order granting leave to file the information and setting aside the subsequent proceedings.

The right to personal liberty is one of the unalienable rights of the individual:

Declaration of Independence.

This right can only be forfeited in the manner, under the conditions and after the taking in proper form of all of the steps prescribed by law:

Article 5 of the Amendment to the Constitution
of the United States.

And a failure to meet these requirements cannot be

waived by the individual or lost as a result of his inaction.

Territory v. Ah Wah, 4 Mont. 149, 170, 171;
 Lewis v. U. S. 146 U. S. 370; 36 L. Ed. 1011;
 Hopt v. Utah, 110 U. S. 578; 28 L. Ed. 264.

No warrant can legally issue but upon probable cause supported by oath or affirmation:

Article 4 of the Amendments to the Constitution
 of the United States.

It cannot be that probable cause can be shown by admittedly false testimony.

Surely this court will not permit a conviction to stand when it appears on the record as it does in the case at bar that the power of the trial court was set in motion by false swearing.

The rule is that where want of jurisdiction appears on the face of the record, a judgment cannot stand:

Crawford v. Pierce, 56 Mont. 371; 185 Pac. 315;
 Henderson v. Daniels, 62 Mont. 363, 377;

In re Spriggs Estate — Mont. — 216 Pac. 1108.

And there is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired, those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied:

Ex parte Lang, 85 U. S. 163, 178; 21 L. Ed. 872,
 879.

Specification of Error Number 7.

The Information Is Insufficient in Law.

The argument under this specification is directed against:

1. The third count of the Information in which it is charged that the defendant "did then and there wrongfully and unlawfully have and possess intoxicating liquor intended for use in violation of Title II of the National Prohibition Act," and

2. That portion of the fifth count of the Information in which it is charged that the defendant "did then and there wrongfully and unlawfully maintain a common nuisance, that is to say, a place and building where intoxicating liquor was kept * * * in violation of Title II of the National Prohibition Act."

It will be observed that the fifth count of the Information also charged that the defendant "did then and there wrongfully and unlawfully maintain a common nuisance, that is to say, a place and building where intoxicating liquor was * * * manufactured in violation of Title II of the National Prohibition Act" thus attempting to state two conditions under which the defendant was charged with having maintained a common nuisance, contrary to the provisions of the National Prohibition Act. However, as by their verdict finding defendant not guilty on charges contained in the first and second counts of the Information, the jury determined that the defendant was not guilty of manufacturing liquor we take it that it is not necessary to discuss the sufficiency of the fifth count of the Information in so far as it relates to the maintenance of a nuisance growing

out of a supposed manufacture of intoxicating liquors.

For the defendant having been acquitted on a charge constituting an element essential to the existence of another crime charged, to allow a conviction on the last charge, would be to allow the defendant for the same offense to be twice put in jeopardy which is contrary to established law in this country:

Fifth Amendment to the Constitution of the
United States;

Ex Parte Nielson, 131 U. S. 176, 33 L. Ed. 118,
120;

Ex Parte Lange, 85 U. S. 163, 169, 21 L. Ed.
872, 876;

Ex Parte Snow, 120 U. S. 273, 281, 30 L. Ed.
658, 661;

In Ex Parte Nielson, *supra*, Mr. Justice Bradley, speaking for the court, said:

“In the present case, it is true, the ground for the habeas corpus was not the invalidity of an Act of Congress under which the defendant was indicted, but a second prosecution and trial for the same offense, contrary to an express provision of the Constitution. In other words, a constitutional immunity of the defendant was violated by the second trial and judgment. It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person’s constitutional right than an unconstitutional conviction and punishment under a valid law. In the first case, it is true that the court has no authority to take cogni-

zance of the case, but in the other, it has no authority to render judgment against the defendant. This was the case in *ex parte Lange*, where the court had authority to hear and determine the case, but we hold that it had no authority to give the judgment it did. It was the same in the case of *Snow*. The court had authority over the case, but we hold that it had no authority to give judgment against the prisoner. He was protected by a constitutional provision securing to him a fundamental right. It is not a case of mere error in law, but a case of denying to a person the constitutional right." (131 U. S. 183-4.)

Turning now to the question as to whether or not the third count contained in the Information and that portion of the fifth count thereof relating to the maintenance of a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act, it must be borne in mind that Title II of the National Prohibition Act was passed under the grant of power to enforce the first Section of the Eighteenth Amendment to the Constitution of the United States, which prohibits the manufacture, sale and transportation of intoxicating liquors for beverage purposes, and that the mere possession of intoxicating liquor is not contrary to the provisions of either the constitutional amendment or the Act passed for the purpose of enforcing the same:

Street v. Lincoln Safe Deposit Co. 254 U. S. 88,
65 L. Ed. 151.

This is the only reasonable conclusion that can be arrived at from a reading of the statute itself.

Section 3 of Title II provides that:

“No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States, goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor, except as authorized in this Act.”

This exception clearly implies that there are exceptions to the general provisions of the Statute.

Section 29 reads as follows:

“Any person who manufactures or sells liquor *in violation of this title* shall have a first offense by fine,” etc.

Here the clear implication is that liquor may be possessed or kept without violating any of the provisions of Title II of the National Prohibition Act.

By Section 33 of the National Prohibition Act, it is provided that:

“It shall not be unlawful to possess intoxicating liquors in one’s private dwelling while the same is used and occupied by him as his dwelling only, and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling, and his bona fide guests while entertained by him therein.”

Here is a condition under which the statute specifically permits the possession of intoxicating liquor with-

out there being a violation of any law relating to the manufacture or sale of intoxicants, and possession of liquor away from the place in which the owner actually dwells or actual, physical control of intoxicating liquor belonging to another is not necessarily unlawful:

Street v. Lincoln Safe Deposit Co. 254 U. S. 88;
65 L. Ed. 151.

So it is apparent that in a prosecution for a violation of the National Prohibition Act growing out of the possession of intoxicating liquor or the maintenance of a common nuisance as a result of the keeping of intoxicating liquor, it is essential to proper pleading that the existence of the condition under which intoxicating liquor may lawfully be kept must be negated or the absence of the negative averments in pleading must be supplied by the pleader.

This condition is recognized and met by Section 32 of the National Prohibition Act which provides as follows:

"It shall not be necessary in any affidavit, information, or indictment, to give the name of the purchaser, or to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful."

Here we find an implied recognition of the rule that the pleading should include averment showing that the case in which the charge is made does not fall within the provisions of the statute bringing the matter within the exceptions provided by the law itself, and a permission

to cure the defect growing out of their absence by charging in the pleading "that the act complained of was then and there prohibited and unlawful."

The pleader has a choice of methods, but the pleading must of necessity meet one or the other of the requirements of the statute or it is insufficient in law:

Enterprise Sheet Metal Works v. Schendel, 55 Mont. 42, 50-51.

In the case last cited, in determining the sufficiency of a complaint in a civil action under a statute permitting the pleading of certain words instead of the statement of other matters otherwise essential to the statement of a cause of action, Mr. Chief Justice Brantley, speaking for the Supreme Court of the state of Montana, used the following language:

"True, the statute (Rev. Codes Sec. 6572) permits a party declaring upon a contract containing conditions precedent, to allege generally that he has performed all the conditions on his part. In order to avail himself of this permissive provision, however, the pleader must couch his allegation in the terms of the statute or in terms substantially equivalent." (55 Mont. pp. 50-51.)

In the pleading in the case at bar, the Government has failed to include any defensive negative averments or to state "that the act complained of was then and there prohibited and unlawful," as a result of which, we submit the pleading is insufficient in so far as the third count and that portion of the fifth count in which it is charged that the defendant maintained a nuisance,

“that is to say, a place and building where intoxicating liquor was kept,” is concerned.

U. S. v. Cleveland, 281 Fed. 249;

Specifications of Error Numbers 8 and 9.

These specifications relate to the admission in evidence over the objection of the plaintiff in error of statements made and transactions had in his absence and without his hearing.

During the examination of the witness Bolton, the following proceedings were had:

Q. Did you try to gain entrance that day?

A. Yes, sir.

Q. In what manner?

A. I went up to the front door and knocked on the door and a lady came to the door and I said I would like to inspect your gas meter—

MR. BALDWIN. Objected to as incompetent, irrelevant, immaterial and hearsay.

THE COURT: Overruled.

By MR. BALDWIN: We will ask a general objection and exception on the same grounds of all testimony to be given concerning statements made and transactions had in the absence of the defendant.

THE COURT: It will be noted.

A. The lady said, “You can’t get in now, wait a minute;” so I waited about twenty minutes I guess and nobody came back so I goes back down to the office to report it to the foreman down there and I happened to run into Mr. Rodda at the police station.

Q. Is he one of the police officers of the city of Butte?

A. Yes, sir; and I told him I thought—

Q. You don't need to tell what you told him. Now you say you waited for about twenty minutes after the lady told you to wait?

A. Yes, sir.

Q. Did you then leave the house?

A. Yes, sir.

Q. Did you subsequently return there the same day?

A. Yes, sir.

Q. About how long after that?

A. About half an hour.

Q. Who, if anyone, accompanied you to this home?

A. Mr. Rodda and Mr. Fairchild of the police station. (R. pp. 77 and 78.)

And thereafter this witness testified concerning what was found in the house by the officers and everything that was done while they were there, and in the course of his testimony, stated that he did not see the plaintiff in error that day; that he went all through the house with the officers and that the plaintiff in error was not present at that time or place. (R. p. 80.)

The witness, Rodda, next testifying on behalf of the Government, was allowed to testify over the general objection and exception as follows:

Q. As such officer did you on or about the middle or the 18th of April last year go to a house at 205 West Quartz Street in the City of Butte?

A. Yes, sir.

Q. Who accompanied you?

A. Officer Fairchild and Mr. Bolton.

Q. The gentlemen who just testified?

A. Yes, sir.

Q. Was it by virtue of a certain report which he made to you or Mr. Fairchild you went to this house?

A. Yes, sir.

Q. Do you know who was living in that house at that time?

A. Mrs. Carney said she owned—Mrs. Carney says she owns the property her and her husband. (R. p. 81.)

Later when recalled by the Government, this witness testified over the general objection of the plaintiff in error and the further objection that the testimony offered was unnecessary repetition and not proper rebuttal, as follows:

Q. Mr. Rodda, when you went up to the doorway or door in this house on the occasion you testified to was the door open or closed?

A. The door was closed.

Q. What did you do?

A. Knocked at the door.

Q. Who came to the door?

A. Mrs. Carney.

Q. Is that the first place in or about the house you saw her?

A. Yes, sir.

MR. BALDWIN: Objected to as unnecessary repetition and not proper rebuttal.

Q. Let me ask you what, if anything, did she say to

you about a search-warrant?

A. She didn't say anything about the search-warrant until after we got the still and mash.

Q. What did she say then?

A. She said have you got a search-warrant and I said no, lady, we got a still.

Q. Was she present to see you take the still?

A. Yes, sir.

Q. How close did she stand?

A. Right close by me; probable two feet away.

Q. Did she make any explanation to you about the presence of the still or mash or moonshine in the house?

A. No, sir.

Q. She didn't say anything about any man by the name of O'Donnell?

A. After a while she did.

Q. Was that before or after she asked if you had a search warrant?

A. After. (R. p. 123-4.)

The testimony given by these witnesses concerning transactions had and conduct of and statements made by the wife of the plaintiff in error was forcibly called to the attention of the jury by the court in its charge.

While charging the jury, the court used the following language:

"Now, Gentlemen, as to evidence. The meter man goes there and asks to be admitted as he has a right to; he is met with an objection at the door and the reason for which he didn't know; you have heard the wife's statement as to why she didn't allow him; he says he

stood there twenty minutes, she didn't say how long; he went away and he reports to the officers; what he reports we are not interested in, but at any rate all go back together, and here comes the first contradiction between the officers and the wife; Rodda says he knocked and in a minute the witness came to the door. She testifies she sat in the kitchen with the baby and saw nobody or heard nobody until the officers came in the kitchen. Rodda says the officers looked through the door into this east side kitchen nearly opposite to the west side of the kitchen, was standing half open or ajar to some extent and Rodda pushes it open and finds the still, intoxicating liquor, moonshine and mash which Rodda says was fermenting and ready to be distilled.

* * * * * While taking it out apparently nothing was said by his wife, no excitement so far as the evidence shows, didn't say anything, made no objections. But after getting it out she begins to ask about a search-warrant. She first testified she didn't and afterwards she said she didn't remember. The officers said she did. If defendant and his wife were not concerned why wouldn't she be anxious to have it carried out instead of inquiring for a search warrant? At that time after removing it had taken some little time, she first began to make an explanation and began to account for it by a man named O'Donnell who rented the rooms. (R. pp. 130-1.)

Plaintiff in error contends that the admission of this evidence was error which affected his substantial rights.

It violates the first principle in the law of evidence to

allow a party to be affected either in his person or property by the declaration of a witness made in his absence or not under oath:

10 R. C. L. p. 960;

Connors v. People, 18 Colorado, 383; 33 Pac.
159, 161.

In the case last cited, the court used the following language:

“The witnesses Farley and Newcone were permitted over objections to testify to statements made to them by the witness Halladnot made in the presence of the plaintiffs in error or either of them. This was hearsay evidence and clearly inadmissible * * * * The admission of this testimony was so clearly violative of every rule of evidence that in itself it would compel a reversal of the case and it becomes unnecessary to notice the further objections so fully argued by counsel. For the reasons given, the judgment will be reversed.” (33 Pac. 161-2.)

This rule applies to the statements of a wife even in civil cases and the fact that a party to a suit is the husband or wife of another person does not render the acts, admission or declarations of the latter admissible against the former. When offered in a suit by a third person against either husband or wife, declarations of the other spouse will be rejected unless the statements are shown to be admissible within some one of the rules applicable to parties generally, as for example, the rule permitting proof of declarations of agents, or that re-

lating to admission by acts, conduct or silence, or because the wife claims under and through the husband. To render the declarations of either admissible against the other on the ground of agency, it must be shown that the statements were within the scope of the declarants of authority:

1 R. C. L. p. 515, Sec. 56.

There is nothing in the evidence tending to show that the wife of the plaintiff in error was his agent or authorized by him in any way to do or say any of the things she did or said.

So even if the case were a civil case, the admission of the testimony relating to statements and conduct of the wife of the plaintiff in error in his absence would have been error.

There is another reason why the court erred in admitting the testimony admitted over the objection of plaintiff in error.

It was a well known rule of the common law that neither husband nor wife was a competent witness in a criminal action against the other except in cases of personal violence, the one upon the other, in which the necessities of justice compelled a relaxation of the rule and this rule has not been changed by any statute of the United States in so far as cases such as the case at bar are concerned as a necessary corollary of which testimony concerning the conduct of the wife of a party accused of crime or statements made by her in his absence or without his hearing cannot properly be admitted against him:

Johnson v. U. S. 221 Fed. 250, 251;

Bassett v. U. S. 137 U. S. 503; 34 L. Ed. 762,
763-4;

Humphreys v. State — Miss. — 84 So. 141,
142-3.

Wharton's Criminal Evidence, p. 992, Sec. 480.

In the last case cited, the defendant was convicted of stealing cotton. The record discloses that a constable and deputy sheriff who arrested him, were permitted over the defendant's objection to state the following circumstances; that he went to the defendant's home about 9 or 10 o'clock on Saturday morning and placed defendant under arrest; that at the time the defendant stated that he had not eaten breakfast and there was apparently some delay in leaving the house on that account; that the officer suggested to the defendant's wife that he desired to search the house on account of cotton stealing; that the wife told him all right, and proceeded to pull up a mattress and exhibit a very large and long cotton sack, and thereupon stated to the officer that this was the cotton sack which her husband used in bringing or conveying the cotton from the field to the house. Appellant was then carried to jail and incarcerated. On Sunday morning, while the defendant was in jail, the officers returned to the premises where the cotton was grown and made an original investigation about the tracks, and also applied at the defendant's house for the cotton sack, and on doing so found that the sack had been cut up into strips. * * * * In detailing the conversation and statements of the wife, when the defendant

was first placed under arrest, the officer did not make it positive that the defendant actually heard what the wife had to say or that he was called upon either to affirm or deny her statement that the long cotton sack was the one employed in transporting cotton from the field to the cotton pen * * * *

While considering the admission of this testimony the court said:

While the testimony, if believed, is sufficient to support a verdict of guilty, the record nevertheless presents a close case on the facts. It is therefore not only of great concern to the accused in this case, but of great importance to an absolutely fair administration of justice, that no error should be committed by the trial court in the exclusion or admission of testimony * * * *.

We shall limit discussion to and decide but a single point. In as much as the state's case is made and upheld by circumstantial evidence, it is no stronger than the weakest link in the chain of testimony. It is, as suggested, very important that the minds of the jurors should not be unduly influenced by incompetent testimony. It is not clear from the testimony that appellant heard the full conversation between the officer and appellant's wife at the time the house was first searched and defendant arrested. It does not appear why or upon what charge or under what authority the arrest was made. Inferentially it appears that the arrest was based upon some other charge or at least upon a mere suspicion of the officer that appellant had something to do with this cotton stealing. It affirmatively appears

that appellant had not at that time been charged with the crime and a full investigation even by the officer had not then been made.

Under these circumstances the officer was permitted to testify that the wife exhibited an extra large cotton sack and admitted that this particular sack was used by them in transporting cotton from the field. He was also permitted to testify that while the defendant was in jail at Holly Springs, he went back to the home in search of this sack and found that it had been destroyed. Certainly the defendant did not destroy it, and inferentially it appeared that the wife destroyed the sack and upon the theory that it furnished evidence of the defendant's guilt. Naturally it would be taken by the jury as an overt act by the wife in recognition of the defendant's guilt. Now, it must be conceded that the state could not place the wife upon the witness stand, and thereby prove by her directly what was indirectly shown through the officer. This incompetent evidence as a whole, operated as a confession by the wife of her husband's guilt. On a close case of the kind under review it very probably had influence with the jury and operated to the defendant's prejudice. We think it is sufficiently damaging to upset the verdict and justify a new trial.

We shall neither discuss nor decide the other points argued.

Reversed and remanded. (84 So. 142-3.)

So in the case at bar, the wife of the plaintiff in error would not have been permitted to go upon the stand and

testify that her husband actually owned the intoxicating liquor, mash or still or that he had any connection with the same or had manufactured or sold any intoxicating liquor and it was clearly error for the court to admit testimony concerning statements made by her and her conduct during the absence of the plaintiff in error on the theory that by inference it might be found therefrom that the plaintiff in error was the owner of the liquor, mash or still or had participated in the manufacture or sale of intoxicating liquor.

Specification of Error Number 10.

This specification is based upon the Order of the Court denying the Motion of plaintiff in error for a directed verdict made at the close of the Government's case: (R. p. 91.)

At the close of the evidence in every trial by jury, the question of law, not whether the weight of the evidence sustained the claims of the plaintiff or defendant, but whether or not there is any substantial evidence to sustain the claim of the plaintiff necessarily and unavoidably arises and the duty rests upon the trial court to direct a verdict for the defendant if there is no such evidence.

It is certain that evidence of facts as consistent with innocence as with guilt is not sufficient to sustain a conviction and that at the close of every trial by jury, it is the duty of the court upon request, to consider and determine whether or not there is any substantial evidence of the guilt of the accused and if there is none, to instruct the jury to return a verdict for the defend-

ant. If there is at the close of the trial, no substantial evidence of facts which exclude every other hypothesis but that of guilt, there is no substantial evidence of the guilt of the accused, for facts consistent with his innocence are never evidence of his guilt:

Isbell v. U. S. 227 Fed. 788, 792;

Norowitz v. U. S. 282, Fed. 575, 578.

Or as the rule is otherwise stated, there is a legal presumption that the party accused is innocent until he is proven to be guilty beyond a reasonable doubt. The burden is upon the Government to make this proof and evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction:

Union Pacific Coal Co. v. U. S. 173 Fed. 737, 740.

For the defendant in a criminal case may not be convicted on conjecture however shrewd, on suspicion, however justified, on probability, however strong, but only upon evidence which establishes his guilt beyond a reasonable doubt; that is upon proof such as to logically compel the conviction that the charge is true:

State v. Riggs, 61 Mont. 25, 51;

Mickle v. U. S. 157 Fed. 229.

The question then is—Does the record in this case contain substantial evidence of facts which exclude every

reasonable hypothesis but that of guilt?

Our contention is that it does not.

Presumption of Innocence.

In the investigation and estimate of criminatory evidence, there is an antecedent *prima facie* presumption in favor of the innocence of the accused grounded in reason and justice not less than in humanity and recognized in the judicial practice of all civilized nations, which presumption must prevail until it is destroyed by such an overwhelming amount of legal evidence of guilt as is calculated to produce the opposite result. This presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. This presumption on the one hand, supplemented by any other evidence he may adduce and the evidence against him, on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn. The fact that the presumption of innocence is recognized as a presumption of law is characterized by the civilians as a *presumptio juris*, demonstrates that it is evidence in favor of the accused, for in all systems of law, presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficacy:

Coffin v. U. S. 156 U. S. 431; 39 L. Ed. 481, 493.

And where circumstantial evidence alone is relied upon, as it is in this case, to overcome this presumption of innocence, the criminatory circumstances proved must be consistent with each other and point so clearly to the

guilt of the accused as to be inconsistent with any other rational hypothesis.

State v. Ducolon, 60 Mont. 594, 597; 201 Pac. 267, 268;

McLaughlin v. State, Okla. Cr. Ap., 193 Pac. 1010;

Gardner v. State, Wyoming, 196 Pac. 750;

Scoggins v. U. S. (CCA 8 Cir) 255 Fed. 829; 3 A. L. R. 1093;

Union Pacific Co. v. U. S. 173 Fed. 729, 740;

Goff v. U. S. 250, Fed. 295-6;

Wharton's Criminal Evidence, pp. 1643-4.

As stated by the learned author last cited, circumstantial evidence is limited by or rather should be justified by the following rules which while they may be differently phrased, are fundamental rules in all jurisdictions:

1. It should be acted upon with caution.
2. All the essential facts must be consistent with the hypothesis of guilt as that is compared with all the facts proved.
3. The facts must exclude every other reasonable theory but that of guilt.
4. The facts must establish such a certainty of guilt of the accused as to convince the judgment beyond a reasonable doubt that the accused is the one who committed the offense.

And for the purpose of proving the identity of the accused as the person who committed the crime, it is essential that the circumstances proved constitute an un-

broken chain which leads to but one fair and reasonable conclusion and which points to the defendant to the exclusion of all others as the person guilty.

16 C. J. 774.

When these rules are applied to the record in this case, the facts proven, fail to satisfy the legal requirements.

Three witnesses were called and testified on the part of the Government and taking all of the testimony given by each of them as true, and drawing from it those inferences which might properly be drawn, the evidence fails to show criminatory circumstances consistent with each other and pointing so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis or which points to the defendant to the exclusion of all others as the guilty person.

From the testimony of the witness Fred Bolton, it appears that on the 18th day of April, last year, he went "to a residence at 205 West Quartz Street, in the City of Butte," and tried to gain entrance for the purpose of inspecting a gas meter contained therein; that a lady said "You can't get in now, wait a minute," and that he waited for about twenty minutes as he guessed, and nobody came back, whereupon he left, and later and on the same day, returned with officers Rodda and Fairchild; that Mr. Rodda went to the front door and Mr. Fairchild and the witness went to the back door; that he don't know what took place at the front door but that officer Rodda let he and Fairchild into the building and that later, while there, he saw "in that house a still;" that the house is "a double house" and that there were

two kitchens in the house and the still was found in the kitchen on the east side of the house; that the lady who had spoken to him and who he saw in the house was "in the other side of the house;" that beside the still he saw a fifty gallon barrel of corn mash which had an odor and that "a small bottle" of whiskey was found in the house; that he did not see the defendant on the premises at any time while he was there.

Officer Rodda testified that he went "to a house at 205 West Quartz Street, in the City of Butte "with officer Fairchild and Mr. Bolton, on April 18, 1922; that he got into the house "in over a minute" after the first knock, and told Mrs. Carney that he was a police officer. In describing the house he said "It is a large building with hallway going back between the center of the rooms at the right and also on the left; that the still was found in the kitchen on the east side of the building and that "Mrs. Carney was in the west side of the building in the kitchen;" that the defendant was not around there at the time; that when Mrs. Carney opened the front door, an odor attracted his attention; that Mrs. Carney accompanied him to the kitchen where the still was and entered after he opened the door; that she did not say anything until after the still and mash had been found, when she said: "Have you got a search warrant?" That she told the officer that a man named O'Donnell was renting the premises where the still was found and told him where O'Donnell worked and said that she did not know anything about the still, moonshine or mash. The officer also testified that he found

a fifty gallon barrel of mash and about ten gallons in another barrel, a beer keg; that the mash was corn and in a state of fermentation and that he found pretty near one-half gallon of moonshine whiskey in the east side of the house; that the still, mash and whiskey were taken from the house; that he wanted to pour the mash down the sewer but that Mrs. Carney objected because she was afraid that the sewer would be stopped up and that he threw the mash in the back yard. From his testimony it appears that he arrested the defendant Carney the next day at the place mentioned in the Information. The officer testified that in the room where the still was there was a stove, kitchen utensils, a chair or two and that "it appears the premises were being used;" that in the other room he found a bed and he was not questioned further concerning the contents of any of the rooms. He also testified that at the time the defendant was arrested, he was returning home from work and stated that another man had been renting the rooms on the east side of the building.

During the course of the examination of this witness the following took place:

Q. What if anything did the defendant say the next day when you found him?

A. Mr. Carney?

Q. Yes?

A. He said another man had the renting of them rooms, rented them from him.

Q. He said another man had been renting the rooms?

A. Yes, sir.

Q. If the court please I find I am taken by surprise in this action by his testimony.

THE COURT: You may show if he made contradictory statements.

Q. You signed an affidavit did you not Mr. Rodda, that while engaged in the duties of your——

MR. BALDWIN: We ask the affidavit be shown to him.

Q. You saw the affidavit?

A. There are lots of affidavits we sign when we are in a hurry and have to get out. This is not right, Mr. Carney wasn't there.

Q. You signed that affidavit?

A. Yes, sir.

Q. In that affidavit you stated that while engaged in the discharge of your official duties you were at the premises situated at 205 West Quartz Street, and found there a twelve gallon still together with equipment used in connection with the same set up and in operation and also found Anthony Carney in said premises and manufacturing intoxicating liquor. That's what you said in the affidavit?

A. There is a mistake in it, whoever wrote it up, yes sir.

So, on the record, this witness was impeached and discredited by the Government itself. The same condition exists with reference to the witness Fairchild who testified on behalf of the Government.

The witness Fairchild stated that on April 18, he went with Mr. Bolton and officer Rodda to a building at 205

West Quartz Street; that they found one-half gallon of moonshine whiskey and sixty gallons of mash, a still "in the kitchen on the east side of the house;" that he did not see any person in the room where these things were found besides the two officers; that he saw a lady there "but she was on the west side" and that the lady did not accompany him or anybody else into the room where the whiskey was found; that the defendant was not there at the time; that the officers found the still and whiskey in the kitchen and in the next room to it, found a bed and about sixty gallons of mash at the foot of the bed, and while under examination by the court, testified as follows:

Q. What else was on the east side of the house besides what you found?

A. We found the still and whiskey in the kitchen, in the next room we found a bed sitting in that room and about sixty gallons of mash at the foot of the bed, a fifty gallon barrel and a ten gallon keg. That was all I saw there.

Q. Any clothing or anything?

A. No, sir. Nothing more than bed clothing.

Q. Any tables, dishes, anything else?

A. No sir.

Q. Did you see anyone's shoes or hats or anything?

A. No sir, I don't think I did.

Q. How many rooms on that east side?

A. I think there are three rooms on that side, I don't know. I could not say.

This is the only testimony given by this officer con-

cerning the contents of the rooms on the east side of the building and no testimony on that matter was given by the witness Bolton.

With reference to the contents of the rooms on the east side of the building, officer Rodda testified as follows:

Q. In the room where the still was, what was there besides the still, mash and whiskey?

A. There was a stove.

Q. Kitchen utensils?

A. Yes sir and a chair or two.

Q. Did it appear to be a kitchen used by somebody for cooking?

A. It appeared the premises were being used.

Q. Did you go into any other room on that side of the house?

A. Yes sir.

Q. Did you find anybody living there?

A. No one was there when we went there.

Q. Did you find the rooms filled with furniture or fixtures?

A. Yes sir, a bed in there.

So, it seems that the witness Rodda saw things in the premises of a useful character that were not observed by the witness Fairchild and it is not unreasonable to infer that there were many things of a nature useful in keeping house and actually living, which they did not observe or recall observing for the reasons that their attention was directed to the things they sought and they had no occasion to look for things which might

reasonably be expected to be found in the quarters used for living purposes.

In addition to having admitted that they had mistakenly made statements of facts under oath in the form of an affidavit, which were directly opposed to the testimony they gave when under oath, when testifying as a witness in the trial of this case, these witnesses contradicted each other flatly on the question as to whether Mrs. Carney did or did not go into the kitchen on the east side of the building where the still was found and as a result, it may be and reasonably is to be inferred that officer Rodda was probably mistaken concerning the details as to what occurred during the time the officers were in the premises and just what Mrs. Carney said and when she said it, if at all. At any rate the Government rested its case on the testimony of two witnesses who according to their own admission while testifying had made false statements under oath in the affidavits used by the Government to put the machinery of the court in motion and who were impeached by the Government itself during the course of their examination in chief by the United States Attorney and one other witness whose testimony failed to connect the plaintiff in error with the premises or anything in them.

Indeed there was no testimony offered by any of the Government's witnesses connecting the plaintiff in error in any way with the building in which the liquor, mash and still were found or anything in it other than the testimony of the witness Rodda, who stated that Mrs. Carney stated to him that she and her husband owned

the building (R. p. 81). And later testified that during the same conversation, Mrs. Carney stated to him that the part of the building in which the liquor, mash and still were found were rented to a man named O'Donnell (R. p. 124).

This testimony clearly fails to prove as the law requires, that any of the offenses charged in the Information had been committed by anyone or that the defendant was in any way a party to or interested in or had any knowledge concerning the commission of any of the crimes charged.

The burden is on the Government to establish the guilt of the accused; that is to prove every fact and circumstance which is essential to the guilt of the accused or as frequently stated, to prove every essential element of the crime charged including the criminal intent, and to prove each item as though the whole issue rested on it:

16 C. J. 528-9;

Fraser v. U. S. — Okla. — 103 Pac. 373, 374.

And the prosecution has the burden of proving that a crime has been committed before the jury proceed to inquire as to who committed it. For the proof of a charge in criminal causes involves the proof of two distinct propositions; first, that the criminal act itself was done and secondly, that it was done by the person charged and by none other; in other words, proof of the *corpus delicti* and of the identity of the prisoner:

16 C. J. 529;

Sanders v. State — Ala. — 52 So. 417; 28 L.

R. A. N. S. 536, 538;

Goff v. U. S. 257 Fed. 294, 295;

Gardiner v. State — Wyo. — 196 Pac. 750;

15 A. L. R. 1040, 1046.

While the identity of the accused as the person who committed the crime and the criminal intent necessary to the conviction of crime may be established by circumstantial evidence, such evidence cannot establish:

1. The identity of the accused unless the circumstances proved constitute an unbroken chain which leads to but one fair and reasonable conclusion and which points to the defendant, to the exclusion of all others, as the guilty person; and

16 C. J. 774.

2. The criminal intent unless such intent is reasonably deducible from all the circumstances proved; that no other intent is inferable therefrom and that the circumstances proved are not consistent with the absence of criminal intent:

16 C. J. 773.

With this statement of the evidence and the legal principles controlling in the matter now under discussion, we will proceed to a discussion of the several crimes charged in the Information on which the plaintiff in error has been convicted.

Third Count.

The charge contained in this Count of the Information is that at a time and place therein specified, the plaintiff in error did wrongfully and unlawfully have

and possess intoxicating liquor intended for use in violation of Title II of the National Prohibition Act. (R. pp. 3 and 4.)

This charge is based upon Section 25 of the National Prohibition Act:

41 Stat. at L. p. 315;

2 Fed. Stat. Ann. p. 213.

which so far as it is material here is as follows:

“It shall be unlawful to possess any liquor * * *

intended for use in violation of this title * * * .”

Since here, as always, the purpose of Congress in enacting a law is of importance in determining the meaning of it. It is noteworthy that Title II of the National Prohibition Act was passed under the power to enforce the first section of the Eighteenth Amendment to the Constitution of the United States, which prohibits the manufacture, sale and transportation of intoxicating liquors for beverage purposes only and that it is not unlawful to have or possess intoxicating liquor, the unlawfulness declared by Section 25 of the National Prohibition Act being conditioned upon the intended use of liquor in violation of the provisions of that Act:

Eighteenth Amendment to the Constitution of
the United States; Fed. Stat. Ann. 1919 Sup.
p. 839;

Street v. Lincoln Safe Deposit Co. 254 U. S. 88,
91-2; 65 L. Ed. 151, 153.

So the real question involved under this charge is not whether the plaintiff in error in fact had or possessed intoxicating liquor, but whether he had or possessed in-

toxicating liquor with intent to sell, barter or dispose of it in some other commercial way.

Nowhere in the Government's case does it appear that the plaintiff in error ever was the owner of, in the possession of or in the control of, or that he had any knowledge concerning the existence of the liquor stated to have been found by the officers.

So we submit that so far as he is concerned, there is no direct evidence of any kind proving the facts necessary for the Government to prove prior to the entry by the court and jury upon the consideration of the question as to the intent with which the one really having or possessing the liquor had or possessed the same. Nor is there anything in the record tending to show anything from which it might reasonably be inferred that the person having or possessing the liquor stated to have been found by the officers intended to sell, barter or otherwise dispose of the same.

There is nothing in the record tending to show that intoxicating liquor had ever been sold on the premises or that the premises were used for any purpose other than for the purpose of dwelling or that anyone other than those dwelling in the premises ever went into the same or that anyone showing the least sign of intoxication had ever been observed in or near the premises in which the liquor was stated to have been found, or that bottles or glasses such as are ordinarily used in the traffic or sale of intoxicating liquor were found upon the premises, or that the premises had the general reputation of being a place where intoxicating liquors were sold.

So we submit that on the record there is nothing from which it might be inferred reasonably that the plaintiff in error had or possessed the intoxicating liquor stated to have been found by the officers or that it was intended by anyone for use in violation of any of the provisions of the National Prohibition Act.

Evidence much stronger has repeatedly been held to be insufficient to justify a conviction.

In *State v. Jones*, 211 Pac. 1075, the Criminal Court of Appeals of Oklahoma held that proof that a quantity of liquor was in a public place on a single occasion was not sufficient to sustain a conviction.

In *State v. Jenkins*, 213 Pac., the Supreme Court of Montana held that proof of a single sale of intoxicating liquor was not sufficient to justify a conviction on the charge of maintaining a nuisance.

In *Munsey v. U. S.* 289 Fed. 280, 282, it was held that the sale of a bottle of whiskey on a single occasion was not sufficient to justify a conviction on a nuisance charge.

In *Scoggins v. U. S.* 255, Fed. 825; 3 A. L. R. 1093, it was held that proof that the defendant received whiskey in packages regularly up to November, 1915; that in that month he received two packages, one marked 24 pints consigned to Jack McGee and the other consigned to J. Burke; that these packages were delivered in an old out house and that prior to the delivery of these packages, the defendant had received other packages of like character consigned to himself and that in November, 1915, a witness called by the Government took a

bottle of whiskey from the defendant's pocket and promised to pay him therefor the next day, was not sufficient to justify a conviction of selling intoxicating liquor.

We are aware that this court has held that a single sale of intoxicating liquor is sufficient to justify a conviction on a nuisance charge. However, so far as we are informed, it has never been held that a single sale of intoxicating liquor will justify a conviction unless the place in which the sale is made is a place fitted up for the sale of liquors to which the public resorts and where the surrounding circumstances proven, were such that it appeared on the record that the sale was one of the ordinary recurring transactions in the business usually carried on at the place involved.

No such showing was made here and cases of the kind last referred to are not authority for a position opposed to the position contended for by the plaintiff in error in this case.

For in the case at bar the conviction is based solely upon inference drawn from evidence which is not sufficient in law to support them.

An inference is a deduction which the reasoning of the jury makes from facts proved without an express direction of law to that effect.

Any inference which the jury are justified in acting upon as affecting the issues before them must be a reasonable deduction from the evidence, and the inference drawn should be clear and strong, the natural and logical result of an open and visible connection between the principal and the evidentiary facts. A verdict based

upon an inference drawn from another inference is based upon mere speculation and therefore not warranted by the evidence.

3 Encl. of Ev. p. 65-68;

16 C. J. p. 534;

G. N. Ry. Co. v. Johnson, 176 Fed. 328;

M. K. & T. Ry. Co. v. Foreman, 174 Fed. 377,
383;

U. S. v. American Surety Co. 161 Fed. 149, 151-2;

U. S. v. Ross, 92 U. S. 281-283, 23 L. Ed. 707,
708;

Manning v. Mutual Life Ins. Co. 100 U. S. 675,
697, 25 L. Ed. 761, 763.

In the case of U. S. v. Ross, *supra*, the court used the following language:

“It is obvious that this presumption could have been made only by piling inference upon inference, and presumption upon presumption. Because the thirty-one bales of the claimant were taken to the warehouse alongside of the railroad at Rome in May, 1864, and the cotton in that warehouse afterwards at some unknown time (whether before or after Aug. 19 does not appear), was shipped on the road to Kingston, it is inferred that the claimant’s cotton was part of the shipment. Because somebody’s cotton (how much or how little is not shown) arrived at Kingston from Rome at some time not known, and was forwarded to Chattanooga before the 19th of August, 1864, it is inferred that the claimant’s thirty-one bales, presumed

to have reached Chattanooga, thus arrived and were forwarded; and, because forty-two bales were received at Chattanooga on that day from the quartermaster at Kingston, it is inferred that the claimant's bales were among them. These seem to us to be nothing more than conjectures. They are not legitimate inferences, even to establish a fact, much less are they presumptions of law. They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. Starkie on Ev., p. 80, lays down the rule thus: 'In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very facts in issue.' It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open, visible connection between the principal and evidentiary facts and the deduction from them, and does not permit a decision to be made on remote inferences. * * A presumption which the jury is to make is not a circumstance in proof; and it is not,

therefore, a legitimate foundation for a presumption." (23 L. Ed. p. 708.)

Before a conviction on the Third Count contained in the Information in the case at bar could legally be had, the burden was upon the Government to prove that the plaintiff in error had and possessed the intoxicating liquor mentioned therein and that he intended to use it in violation of Title II of the National Prohibition Act.

To arrive at the conclusion it did arrive at, the jury must have inferred from the fact that the witness Rodda testified that Mrs. Carney stated that she and the plaintiff in error were the owners of the building in which the liquor was stated to have been found, that the liquor was had and possessed by the plaintiff in error and as an inference therefrom that the plaintiff in error intended to use the liquor in violation of the National Prohibition Act.

Both of these inferences are based upon mere conjecture and neither one of them has any sound basis in the proof offered by the Government in this case.

It is clear that to allow the conviction on that count of the Information to stand, would be to allow a verdict based on an inference drawn from another inference; in other words based upon mere conjecture, to stand, which is unthinkable.

Fourth Count.

In the Fourth Count of the Information it is charged that at the same time and place, the plaintiff in error did have and possess property designed for the manufacture of intoxicating liquor intended for use in violation

of Title II of the National Prohibition Act.

This charge is also based upon Section 25 of the National Prohibition Act, which in so far as it is material here is as follows:

"It shall be unlawful to have or possess * * * property designed for the manufacture of liquor intended for use in violating this Title."

So it is incumbent upon the Government to prove that the plaintiff in error had or possessed property adapted for the manufacture of intoxicating liquor and that he intended to use liquor manufactured with it in violation of some provisions of the National Prohibition Act.

On the evidence outlined above the Government wholly failed to sustain this burden.

There is no direct evidence tending to show that the plaintiff in error owned, had, possessed or controlled or had any knowledge concerning any property designed for the manufacture of intoxicating liquor. The only proof that the Government offered which could in any way connect the plaintiff in error with even the building in which the property was found or with any of the illicit property contained therein, was the testimony of the witness, Rodda, who stated that Mrs. Carney, the wife of the plaintiff in error, said that she and her husband owned the building in which the property was found.

It does not appear from the evidence when the illicit property went into the building, by whom it was put

there or that it had ever been used for any purpose at all.

To allow the conviction on this count of the Information to stand would be to sustain a verdict based upon an inference growing out of another inference. In other words, to allow the jury to infer from the statement as to the ownership of the building that the plaintiff in error was the owner of the property said to be designed for the manufacture of intoxicating liquor and from such ownership to infer that he intended to use the same for the purpose of manufacturing intoxicating liquor and that he also intended to use the intoxicating liquor intended to be manufactured in violation of some provision of the National Prohibition Act.

To allow the verdict to stand would be to allow the plaintiff in error to be punished under a verdict based upon mere speculation which under the authorities heretofore cited is contrary to right and law.

Fifth Count.

In the Fifth Count of the Information it is charged that at the same time and place the plaintiff in error did unlawfully maintain a common nuisance; that is to say, a place and building where intoxicating liquor was kept and manufactured in violation of Title II of the National Prohibition Act.

This charge is based upon Section 21 of the National Prohibition Act which so far as is material here provides that any room, house, structure, or place where intoxicating liquor is manufactured or kept in violation of this Title is hereby declared to be a common nuisance

and any person who maintains such a common nuisance shall be guilty of a misdemeanor.

It will be observed that in this Count it is charged that the plaintiff in error maintained a common nuisance in two ways: by keeping intoxicating liquor in violation of Title II of the National Prohibition Act and manufacturing intoxicating liquor in violation thereof.

However, by their verdict of not guilty on the first and second counts contained in the Information herein, the jury of necessity found that the charge contained in the Fifth Count of the Information in so far as it relates to the manufacture of liquor was untrue, and as a result further contention concerning that portion of the charge contained in the Fifth Count of the Information is foreclosed.

We submit that there was no substantial evidence in the record tending to show that the plaintiff in error kept any liquor on the premises for any purpose.

There is nothing in the record tending to show that the intoxicating liquor stated to have been found in the building belonged to the plaintiff in error or that he had any control over or knowledge concerning the same.

It does not appear from the evidence when, or by whom the intoxicating liquor said to have been found in the building was taken there.

It does not appear from the testimony that any intoxicating liquor had ever been used or disposed of in the building or that the quantity of intoxicating liquor originally taken into the building had in any wise diminished.

While it does appear from the testimony of the witnesses for the Government that the plaintiff in error was not the only person who had access to the premises or who could have put the liquor where it was said to have been found, from which it follows that on the facts proved, it cannot be said with any reasonable degree of certainty that the plaintiff in error kept the liquor in the place where it is said to have been found, and on the facts and law above outlined, we submit that even if it be conceded for the sake of the argument that the plaintiff in error owned the liquor stated to have been found, there is no substantial evidence in the case upon which a verdict finding that he kept the same for the purpose of sale, barter or other commercial use, could be based.

While on the record made by the Government itself, it appears that the conditions were such that if the plaintiff in error was in the personal and exclusive control of the portion of the building in which the intoxicating liquor is stated to have been found, he would have had a legal right to keep and possess it there.

From all of the testimony offered for the Government, it appears that the house at 205 West Quartz Street, in the city of Butte, in which the liquor is stated to have been found, was used as a private dwelling and it is not unlawful to possess liquors in one's private dwelling while the same is occupied and used by the possessor as his dwelling only and such liquor need not be reported:

Sec. 33, National Prohibition Act:

Street v. Lincoln Safe Deposit Co. 254 U. S. 88;

65 L. Ed. 151, 153.

So the Government is caught between the horns of a dilemma.

If it is conceded that the house in which the intoxicating liquor is stated to have been found was the residence of the plaintiff in error as the Government seems to contend it was, no violation of the National Prohibition Act was shown. If on the other hand, the Government concedes that the statement made by Mrs. Carney to the effect that the portion of the building in which the intoxicating liquor is stated to have been found, had been rented to and was in the exclusive possession of one O'Donnell, the proof of guilt so far as the plaintiff in error is concerned absolutely fails.

There Is Nothingg in The Record Tending to Show That The Plaintiff In Error Had Any Knowledge Or Reason to Suspect The Use to Which the Portion of The Building On the East Side of the Hallway Was Put.

There was nothing in the evidence other than an odor stated by the officers to have been noticed by them as they entered the hall tending to call the attention of anyone to the use to which the portion of the building on the east side of the hallway was being put, and it is not shown that this odor had been perceptible at any time before the officers entered the hallway, though it does appear from the testimony of the witness, Rodda, while testifying for the Government, that it takes all the way from eight to twelve days for fermenting mash to give off an odor and that the odor does not become strong until it is ready for distillation. (R. p. 24.)

There is absolutely nothing in the record showing when the plaintiff in error was last in the building.

So, as far as the record is concerned, it is entirely barren of anything which could reasonably be held to prove that there was any suspicious fact or circumstance which should have called his attention to the illicit use to which the property was being put. Even if he had had actual knowledge that mash was fermenting on the east side of the house and that there was a still there, and that there was intoxicating liquor kept there intended for use in violation of the National Prohibition Act, these facts would not justify a verdict of guilty in this case in the absence of a showing of other facts connecting him with the transportation of which the record is entirely barren.

It is settled law that one who is possessed of knowledge of the commission of an offense which knowledge he fails to disclose, may not upon proof of such facts alone, be held guilty of crime:

State v. Brown, Wash. 209 Pac. 855, 857;

Bird v. U. S. 187 U. S. 118, 133; 47 L. ed. 100,
106.

And in recognition of this principle, Congress definitely fixed the penalty to be imposed upon a person who having knowledge or reason to believe that his premises were being occupied or used for the manufacture or sale of intoxicating liquor suffers the same to be so occupied or used.

Section 21 of the National Prohibition Act, after defining a common nuisance and fixing the penalty to be

imposed on one guilty of maintaining a common nuisance, proceeds as follows:

“If a person has knowledge or reason to believe that his room, house, building, boat, vehicle, structure, or place is occupied or used for the manufacture or sale of liquor contrary to the provision of this title, and suffers the same to be so occupied or used, such room, house, building, boat, vehicle, structure, or place shall be subject to a lien for and may be sold to pay all fines and costs assessed against the person guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction.” (41 Stat. L. 313.)

So on the record, there is no substantial evidence justifying the verdict of guilty returned on the Fifth Count contained in the Information.

Such was the holding of the Criminal Court of Appeals of Oklahoma in a case practically on all fours with the case at bar:

Webb v. State — Okla., Cr. A. — 211 Pac. 524.

Specification Number Eleven.

This specification is based upon the statement of the court made in the presence of the jury when overruling the Motion of plaintiff in error for a directed verdict.

At that time, the court stated “the evidence is enough to hang a man if he was on trial for murder. The Motion is denied.” (R. p. 91.)

We admit that under the federal practice, a trial judge has a right while charging the jury, to comment on the

evidence for the purpose of making the issues clear and assisting the jury in arriving at a just and proper verdict in the case on trial. However, we insist that no Federal Judge sitting in the trial of a criminal case has a right in the presence of the jury to make a comment of the kind the trial court in this case did make in denying a motion for a directed verdict. When the remark was made the trial judge was not charging the jury concerning the law and the facts in the case. The statement was out of place and showed to the jury clearly and pointedly what the opinion of the judge of the trial court then was on the question the jury was later called on to decide. All of the testimony offered by the plaintiff in error was received by the jury after that statement was made, and it might reasonably be and probably was not given the same weight or credence that it would otherwise have been given and from that point on, the jury reasonably might and no doubt did consider everything said and done in the light of the statement on which this specification is based.

And the jury might reasonably have inferred that if the evidence was strong enough to justify the hanging of the plaintiff in error if he were being tried on a capital charge, it was more than enough to justify his conviction in the case then on trial and in which the greatest punishment that could be inflicted was imprisonment.

Any lawyer of experience knows that at all times through a trial, men sitting on the jury are anxious to learn the opinion of the trial judge concerning the merits of the controversy, and that they are often quick to

grasp at any intimation as to what the opinion of the trial judge concerning the evidence in the case and its weight is and are apt to and often do base their verdict on an ill considered statement of the trial judge rather than upon that careful, deliberate consideration of the evidence which alone should guide them in determining questions involving the liberty of one accused of crime.

In the circumstances of the case, the remark of the trial judge reasonably might and no doubt did prejudice the plaintiff in error in the eyes of the jury and injuriously affected him in his substantial rights.

Specifications Number Twelve, Thirteen and Fourteen.

Under these specifications, plaintiff in error contend that there is no substantial evidence on the entire record in the case sustaining the charge contained in the Third, Fourth and Fifth Counts of the Information herein.

The sufficiency of the evidence offered by the Government has been argued at length under Specification of Error Number Ten above and we will not discuss further the testimony given by the Government's witnesses but will turn to the other evidence in the record.

It is clear that the Government's case was not strengthened in any way by any evidence offered on behalf of the plaintiff in error.

From the testimony of Mrs. Carney, the wife of the plaintiff in error, it appears that the building in which the liquor, mash and still were stated to have been found is a five room frame building with a hallway running straight through from the front door with two rooms on

the east side and three on the west side and hot and cold water to supply the house keeping rooms; the rooms on the east side of the hallway were fitted up for house keeping (R. p. 101); that Mr. and Mrs. Carney occupied the three rooms on the west side; that for six years immediately preceding the time the officers went to the premises, the rooms on the east side of the hallway had been rented and that they were rented through the month of April, 1922, and that Mrs. Carney had no control over those rooms during that month up to the time the officers came there, the key having been turned over to the renter (R. p. 92 and 93); that at the time the officers came to the house, the plaintiff in error was working at the Bell Mine, where he was constantly employed (R. pp. 93 and 94); that when Mr. Bolton asked admission she was not fully dressed and her baby was sick and crying and she could not let him in at once (R. pp. 94 and 95); that she did not know that the liquor, mash or still was in the east side of the building until the officers discovered them in making the search (R. p. 96).

Mrs. Gannon testified that she had been familiar with the premises for about seven years and that in the early part of April, 1922, while she was visiting Mrs. Carney, there, Mrs. Carney made her acquainted with O'Donnell, who was renting the rooms on the east side of the building, and that she saw O'Donnell in those rooms on one other occasion thereafter and prior to the time the officers went to the premises (R. pp. 103-5).

William Colmer testified that he was a solicitor for

the Gallagher Grocery Company; that for a period of more than six years he had solicited in the building for orders for groceries and during that time the Carneys always lived on the west side of the hall and the rooms on the east side of the hall had always been rented; that he went to the building for the purpose of soliciting orders for groceries at least once a week; that during the month of April, 1922, he got orders for groceries from Pat O'Donnell, who was occupying the rooms on the east side of the building and that he never noticed any smell of mash or anything like that in the building. (R. pp. 106-109.)

Martin Walsh testified that he had been acquainted with the premises for about six years and that during the month of April, 1922, the rooms on the east side of the hall were used by Pat O'Donnell and that at all times during the six years immediately preceding the time when the officers searched the rooms on the east side of the building, the Carneys lived in the rooms on the west side of the hall and never lived in or used the rooms on the east side of the building. (R. pp. 112 and 114.)

Joe Nevin, under whose immediate direction plaintiff in error had worked for a number of years, testified to his capacity and constant employment and good character. (R. pp. 114-116.)

The plaintiff in error testified that for more than six years he had been living with his family at 205 West Quartz Street; that he had never lived in the rooms on the east side of the building; that those rooms had al-

ways been rented; that Mrs. Carney had charge of the renting of those rooms and he paid very little attention to it; that during the month of April, 1922, the rooms on the east side of the hallway were rented by Pat O'Donnell; that the witness did not know that there was any mash, still or moonshine on the premises at any time prior to the time the officers made the search. (R. pp. 118 and 119.)

So on the record we submit that there is no substantial evidence in the case sustaining the charges contained in the Third, Fourth or Fifth Count of the Information.

Specification Number Fifteen.

The Court Erred In Its Charge To The Jury:

During the course of its charge to the jury, the court used the following language:

"Now, then, Gentlemen of the jury, if the defendant had no part in carrying on these operations there, he wouldn't be guilty merely because a tenant used the premises for these unlawful purposes. But you ask yourself whether it is not likely that this O'Donnell, if such a man existed, and it looks fairly reasonable that he did, and this defendant were in partnership in carrying on these operations; is it reasonable that a bootlegger and moonshiner would rent an apartment in the situation these were, having all appliances such as mash, and still, having it in operation across the hall with children running around, unless he and the landlord or owner were jointly interested, working together in violation of the law? You are not to be hoodwinked and bambooz-

led by anybody, not by unreasonable testimony if it is unreasonable. Remember the witnesses on either side can swear that black is white if they think they can cause you to credit it or to entertain a reasonable doubt, but you are not to be gulled. As my honored predecessor, Judge Knowles said, you are not to believe a thing is so simply because someone swears it's so, and if a witness testifies that down the street he saw an elephant climb a telephone pole, you are not bound to believe it's a fact, even though he shows you the pole. You determine the true and false no matter from what witness the evidence comes. Now Gentlemen of the jury, that's the case for you; you have heard it all; you are men of common sense and reason, draw upon your own experience, conceive what your own conduct would be if across your hallway from your kitchen door of your own home a tenant set up a moonshine outfit and make moonshine whiskey, would you know it, how long would you tolerate it? Isn't it the reasonable fact to assume that if there was such a man O'Donnell he and the defendant were in cahoots in carrying on that unlawful business?" (R. p. 132.)

This portion of the charge was excepted to by the plaintiff in error. (R. p. 134.)

The words "bamboozled" and "hoodwinked" and "gulled" have a very definite and well understood meaning and when these words are used in the charge of the court are viewed in connection with the comment of the court concerning the testimony given by the witnesses for the plaintiff in error, the jury would reasonably be

led to believe that the witnesses for the plaintiff in error were trying to deceive and impose upon them and to practice trickery and deception and had been guilty of perjury in an effort to cover and conceal the true facts as a result of which the jury reasonably might have been and no doubt was led in arriving at their verdict in the case, to act upon the theory that the witnesses for the plaintiff in error were not testifying truly.

It is true that by possible construction, the court's remark could be made applicable to the witnesses for the Government as well as to the witnesses for the plaintiff in error. However, when it is recalled that the testimony given by the witnesses for the Government as to what they found in the premises and the condition under which they found it, which is all of the testimony on which the Government's case rests, was not contradicted and was tacitly taken as admitted throughout the trial, the reasonable and only possible effect of the portion of the charge complained of was to direct the attention of the jury unfavorably to the testimony given by those testifying on behalf of the plaintiff in error, which reasonably might and no doubt did discredit them in the minds of the jury and improperly affected the substantial rights of the plaintiff in error.

This portion of the charge to the jury could have had but one effect when considered in the light of the remark of the court that "the evidence is enough to hang a man if he was on trial for murder" made by the court at the time the Motion of plaintiff in error for a directed verdict was denied. (R. p. 91.)

Specification Number Sixteen.

The Court Erred In Denying The Motion of The Plaintiff In Error For a New Trial.

The duty of a court with reference to the granting of new trial has been clearly stated by courts of highest authority.

In the case of *Pleasants v. Fant*, 89 U. S. 116, 121-2; 22 L. Ed. 780, 782, Mr. Justice Miller, speaking for the court used the following language:

“It is the duty of a court, in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in these issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law.

“In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor; that is the business of the jury; but conceding to all the evidence offered the greatest probative force which according to the law

of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not then it is the duty of the court after a verdict to set it aside and grant a new trial." (22 L. Ed. p. 783.)

On the whole record, the condition shown is such that the trial court, in the exercise of a sound, legal discretion, should have granted the Motion of the plaintiff in error for a new trial and this refusal to do so was error.

On the record it appears that the plaintiff in error was improperly arrested, brought into court and tried; that the charges contained in the counts on which he was found guilty are not sufficient in law; that there is no substantial evidence sustaining the conviction on those charges; that there was error in the admission of testimony offered by the Government over the objection of the plaintiff in error; that the trial court erred in making the remark made at the time the Motion of the plaintiff in error for a directed verdict was denied, and that the court erred in its charge to the jury and in denying the Motion of the plaintiff in error for a new trial, as a result of which the judgment and verdict should be set aside and a new trial ordered.

Respectfully submitted,

B. K. WHEELER,
JAMES H. BALDWIN,
WHEELER & BALDWIN,
Attorneys for Plaintiff in Error.

Service of the above and foregoing Brief acknowledged and copy thereof received at.....
Montana, October....., 1923.

.....
*United States Attorney for the
District of Montana.*

IN THE
United States Circuit Court
of Appeals

For the Ninth Circuit

ANTHONY CARNEY,

vs.

Plaintiff in Error,

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
DISTRICT OF MONTANA

JOHN L. SLATTERY,

*United States Attorney,
Helena, Montana,*

RONALD HIGGINS,

*Assistant United States Attorney,
Missoula, Montana,*

W. H. MEIGS,

*Assistant United States Attorneys
Great Falls, Montana,
Attorneys for Defendant in Error.*

IN THE
**United States Circuit Court
of Appeals**

For the Ninth Circuit

ANTHONY CARNEY,

vs.

Plaintiff in Error,

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is an appeal from the United States District Court for the District of Montana, wherein there was judgment on conviction and sentence of the Plaintiff in Error on three counts of an information charging violation of the National Prohibition Act.

THE INFORMATION.

On May 26, 1922, the United States District Court for the District of Montana, granted leave to John L. Slattery, United States Attorney for said District, to file an Information against Anthony Carney, plaintiff in error, and hereinafter called the defendant, charging him with a violation of the National Prohibition Act in five counts. Attached to the Information were two affidavits of Charles Rodda and Sam Fairchild, Police Officers of the City of Butte, Montana.

The first affidavit, sworn to on the 9th day of May, 1922, quoting the charging part only, is as follows:

“That they went * * to premises 205 West Quartz Street, and upon entering noticed a very strong odor of mash, that upon investigation they discovered 75 gallons of mash in a state of fermentation, a quantity of white moonshine whiskey, one 12-gallon still and connections.

That they then arrested Anthony Carney and brought him to Police Station, Anthony Carney being owner of premises, occupying same, and having full control of same.

Sample of mash and whiskey turned over to the Federal Prohibition Department at Butte, Mont., together with still and connections.”
(Tr. 6 and 7).

The second affidavit of these officers, sworn to on the 24th day of May, 1922, quoting the charging part only, is as follows:

“That while engaged in the dispatch of their official duties they were at those premises situated at 205 West Quartz Street, in the City of Butte, and found therein a 12 gallon still, together with the equipment used in connection with the operation of the same, set up and in operation, and also found Anthony Carney in charge of the said premises engaged in the operation of the said still, and in the manufacture of intoxicating liquor.” (Tr. 7 and 8).

The defendant was found guilty in manner and form as charged in the information as to Counts Three, Four and Five, which are set out in full in the Transcript, pp. 3-5.

LEAVE GRANTED TO FILE INFORMATION PROPER.

The first affidavit supra, made by officers having knowledge of the facts, reciting that the officers upon entering the premises at 205 West Quartz Street noticed a very strong odor of mash, the discovery of a 12 gallon still and connections, a half gallon of white moonshine whiskey therewith, and 75 gallons of mash in a state of fermentation,—which, with the fact, stated in the affidavit, that Anthony Carney was the owner, occupying

and having full control of the premises, was sufficient probable cause without more to move the Court in directing the information to be filed and ordering that a warrant of arrest issue for the defendant, Anthony Carney.

PROOF OF PROBABLE CAUSE FOR WARRANT OF ARREST TO ISSUE.

To cause a warrant of arrest to issue, the information must be supported by proof establishing probable cause; that is, by legal evidence that a crime has been committed and that there is probable cause to believe the accused guilty of the commission thereof.

U. S. v. Baumert (D. C. N. Y.) Ray, D. J.
179 Fed. 735.

U. S. v. Wells (D. C. Tenn.) 225 Fed. 320.

It is only where it is sought to issue a warrant that the Constitution requires that the affidavit must be by one knowing the facts; therefore, as there is no statute requiring the verification of an information, an information is not open to attack because verified on information and belief.

Brown v. U. S. (9 C. C. A.) 257 Fed. 703;

Weeks v. U. S. (2 C. C. A.) 216 Fed. 292;

Cert. denied. Weeks v. U. S. 235 U. S. 697.

See also—Kelly v. U. S. (9 C. C. A.) 250
Fed. 947.

THE CASE PRESENTED.

The defendant, Anthony Carney, owns and with his family has resided at his residence located at 205 West Quartz Street, Butte, Montana, for eight years past. The residence faces south and is a five-room frame cottage or house with cellar. A hallway, about four feet wide, dividing the rooms, runs through the house with three rooms on the west side of the hallway and two on the east side with toilet and bath room. Each room has a door opening into the hallway.

On April 18th, 1922, Fred Bolton, a gas meter inspector of Butte, called at the 205 West Quartz Street residence to read the meter. On knocking at the door, Mrs. Anthony Carney, wife of the defendant, came to the door and upon ascertaining the business of Inspector Bolton refused him admission, directing him to "wait a minute." After waiting about 20 minutes, the Inspector left, returning about half an hour later with Charles Rodda and Sam Fairchild, police officers of the City of Butte. Officer Rodda went to the front while Officer Fairchild and Inspector Bolton went to the rear door. (Tr. 77-8).

A strong odor of mash was noticed by Officer Rodda when he came to the front door. (Tr. 83

and 124). A like smell of mash in a state of fermentation was noticeable throughout the house. (Tr. 91).

The door of the kitchen on the east side of the hallway was partially open and through it the officer saw a still. (Tr. 82-3). Pushing the door further open and going in, the still was found on a stove with mash and about half a gallon of moonshine whiskey. (Tr. 84, 89). In the other room was a bed, a fifty gallon barrel and a ten gallon keg of corn mash in a state of fermentation, ready to run through a still. (Tr. 90 and 124). These two rooms on the east side of the hallway contained only the stove, the still, the whiskey, mash, a bed and a chair or two. No table, dishes, food, groceries, clothing or other articles or utensils for domestic use. (Tr. 85, 90). Mrs. Carney was the only person about the house, the defendant not being at home at the time. The next day the defendant was placed under arrest as he came into the house from work. (Tr. 84).

COUNSEL MOVE FOR DIRECTED VERDICT OF "NOT GUILTY".

A re-statement.

At 205 West Quartz Street, Butte, Montana, on April 18, 1922, property designed for and used in the unlawful manufacture of intoxicating liquor was found. There was a 12 gallon still and con-

nections, the manufactured product, and 60 gallons and more of corn mash, in a state of fermentation, ready to run through a still,—all in a house owned, occupied and under the control of the defendant for six or eight years past. No one present or about the premises except the wife of the defendant. She admitted the officers and as they came into the hall a very strong odor of mash permeated the atmosphere. Through the partially opened door of a room on the East side of the hall, a still was seen and all the necessary adjuncts to the manufacture of moonshine whiskey was found .

Thus the evidence of the Government in chief, Thereupon counsel for defendant moved the Court for a directed verdict of “Not Guilty”.

A stronger chain of circumstantial evidence pointing to Anthony Carney as the guilty party could hardly be imagined. So must have felt the Court. Hence his remark in denying motion of counsel for a directed verdict: “The evidence is enough to hang a man if he was on trial for murder.” (Tr. 79 to 91.)

IN THIS THE COURT COMMITTED NO ERROR.

This remark was not made by the Court in his charge to the jury, nor to the jury at all. Simply made within their hearing, but directed to counsel for defendant. Nor was the language of the Court

excepted to. The exception only extended to the denial of the motion for a directed verdict. (Tr. 91.)

The final issue of guilty or not guilty, after the introduction of all the evidence, was specifically left by the Court, in his charge, to the honest judgment of the jury. In a dozen places and more, in the charge to the jury, the Court impressed the thought upon the jury that it was their verdict, their honest judgment that was to decide the case.

At the very outset of the charge, the Court bade the jury remember that court and jury have a divided function and duty.

“Mine,” said the Court, “is to tell you what the law is that applies to the case and you always accept the law from the court; but your function and duty is to determine the truth where the facts are in dispute and where different inferences may be drawn. Remember while you take the law from me you don’t take the facts from me. I might tell you out and out whether or not I think the defendant guilty, I may comment on witnesses and evidence, but even if I did it wouldn’t bind you to come to the same conclusion nor would it be said to bring you to the Court’s conclusion but only to help you to reason to a correct decision.” (Tr. p. 126.)

A FEDERAL DISTRICT JUDGE NOT A MERE AUTOMATON.

A Federal District judge presiding at a trial, civil, or criminal, in any court of the United States, may express his opinion to the jury upon the questions of fact which he submits to their determination.

Simmons v. U. S., 142 U. S. 148.

The objection that the charge unduly emphasized the evidence of the plaintiff, so that the court's opinion would necessarily be inferred from the language, does not require reversal, where the Court stated that his charge was only for the purpose of suggesting the method of consideration.

Calcutt v. Gerig (6 C. C. A.) 271 Fed. 220.

“The jurymen were told repeatedly that they were to decide the questions of fact upon their own judgment, and that the comments of the Court upon the facts were not binding upon them. This was not error, for in the United States Courts the judge may comment on the evidence, call the jury's attention to parts of it that he thinks important, and may express his opinion upon the facts, provided he finally leaves the decision of the questions of fact to the jury.”

Little v. U. S. (8 C. C. A.), 276 Fed. 915-6.

“The rule is well settled in the federal courts that the judge may comment on the evidence and express his opinion of the facts in the case, and advise the jury of his conclusions thereon, provided the jury is given to understand that it is not bound by the judge’s expression of opinion.”

Caudle v. U. S. (8 C. C. A.), 278 Fed. 710-12.

In the case of Dillon v. U. S. (2 C. C. A.), 279 Fed. 639, in the course of his charge, the District Judge used the following language:—

“Now you have heard this case. The Court’s opinion is that the defendant is guilty of the crime charged.”

but leaving the final decision as to guilt or innocence solely to the jury as in the charge in the case at Bar, *supra*. The expression of the court’s opinion of defendant’s guilt was held not to be error. In the opinion by Rogers, C. J. *supra* at p. 643, it is said:

“But, whatever the rule may be in the State courts, it is well established law, which the court has no right or inclination to depart from, that in the federal courts the trial judge is entitled to express his opinion upon the facts and the guilt or innocence of the accused, provided the jury is given unequivocally to understand that it is not bound by the expressed opinion of the judge.”

See also *Horning v. District of Columbia*, 254 U. S. 135.

DeJianne v. U. S. (3 C. C. A.), 282, Fed. 737.

“In the Courts of the United States the judge and jury are assumed to be competent to play the parts that always have belonged to them in a country in which the modern jury trial had its birth.”

Graham v. U. S., 231 U. S. 474-80.

THE INFORMATION—NEGATIVE ARGUMENTS.

Counsel for defendant in his brief (p. 48) argues:—

“In the pleading in the case at bar, the Government has failed to include any defensive negative averments or to state “that the act complained of was then and there prohibited and unlawful,” as a result of which, we submit the pleading is insufficient in so far as the third count and that portion of the fifth count in which it is charged that the defendant maintained a nuisance, “that is to say, a place and building where intoxicating liquor was kept,” is concerned.—”

citing a decision by the District Court for the Southern District of Alabama,—

U. S. v. Cleveland, 281 Fed. 249.

In that case it was charged that the defendant—

“did unlawfully have and possess, to-wit, 33 half pints of illicit liquor intended for use in violation of Title 2 of the National Prohibition Act passed October 28, 1919; that is to say, intended for use as intoxicating beverages, which was then and there prohibited and unlawful.”

The Court in its decision quoted Section 32 of the National Prohibition Act. The part thereof germane hereto reads as follows:—

“It shall not be necessary in any affidavit, information, or indictment to give the name of the purchaser or to include any defensive negative averments, but it shall be sufficient to state the act complained of was then and there prohibited and unlawful, but this provision shall not be construed to preclude the trial court from directing the furnishing the defendant a bill of particulars when it deems it proper to do so.”

Construing this section and particularly the sentence above, reading,—

“But it shall be sufficient to state that the act complained of was then and there prohibited and unlawful.”

the court say:—

“What was meant by “then and there”, unless it was the time and place when the liquor

was possessed by the defendant? Must not the indictment then state this time and place? If so, this would not be a negative or defensive averment, but a positive one. As long as the act recognizes the right of possession and use at certain places, and makes such possession illegal only at other places, then an indictment, to be sufficient, should state a *time and place* where the possession was illegal.” (Italics supplied.)

Now take the information, Third Count. It reads—

“That on or about the 18th day of April, 1922, said Anthony Carney, whose true name is to the informant unknown, at and within certain premises situated at 205 West Quartz Street, in the City of Butte, in the County of Silver Bow, in the State and District of Montana, and within the jurisdiction of this Court, did then and there wrongfully and unlawfully have and possess intoxicating liquor intended for use in violation of Title II of the National Prohibition Act; contrary to the statute in such case made and provided, and against the peace and dignity of the United States of America.”

The possession of intoxicating liquor is made unlawful by the National Prohibition Act. That part germane hereto reads as follows

Title 2, Sec. 3. “No person shall on or after the date when the Eighteenth Amendment to

the Constitution of the United States goes into effect, *** possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.”

POSSESSION OF LIQUOR PRIMA FACIE ILLEGAL.

The possession of liquors after February 1, 1920 is made prima facie evidence of illegal purpose. Sec. 33 of the Act applicable hereto reads as follows:—

“After February 1, 1920, the possession of liquor by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title.”

True the count does not carry the phrase “was then and there prohibited and unlawful”. It alleges, however, “did then and there wrongfully and unlawfully have and possess”, etc.

In an indictment charging in separate counts conspiracy to “unlawfully possess”, to “unlawfully transport”, and to “unlawfully sell” intoxicating liquor prohibited by law, the word “unlawfully” sufficiently excludes the exceptional cases in which

liquor may be lawfully possessed, transported, or sold, under National Prohibition Act, Sec. 3.

Rulovitch v. U. S. (3 C. C. A.), 286 Fed. 315.

Under these sections, the decision last above and U. S. v. Cleveland, *supra*, the Third Count of the information is clearly sufficient.

What is said here with reference to the Third Count applies with equal force to the Fifth Count of the information. The sufficiency of the Fourth Count is passed by or not questioned.

AVERMENT OF PRIVATE DWELLING.

It is easy to be seen, however, that the real thought in the mind of counsel for defendant, in his objection to the sufficiency of the information for that "the Government has failed to include any defensive averments" in his desire to have had the information charge that the defendant "did" *** have and possess intoxicating liquor intended for use *in his private dwelling* in violation" etc.

Counsel in his brief (p. 46) actually goes so far as to quote a part of Section 33 of the Act with reference to the possession of liquors in one's private dwelling, to-wit:—

"It shall not be unlawful to possess intoxicating liquors in one's private dwelling while the same is used and occupied by him as his dwelling only, and such liquor need not be re-

ported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling, and his bona fide guests while entertained by him therein.”

Would counsel go so far as to say “intoxicating liquors may be manufactured in one’s private dwelling while the same is used and occupied by him as his dwelling only, and the possession of such manufactured liquor lawful and need not be reported provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling, and his bona fide guests while entertained by him therein?”

It must be so for in the case at Bar it is liquor manufactured where there was a still and connections and corn mash in a state of fermentation, of very strong odor, “ready to run through a still,”—all in a house owned, occupied and controlled by the defendant for six or eight years past that counsel now argues it is lawful to possess in “one’s private dwelling”.

THE DEFENSE.

Yet counsel defended his case on the theory that the rooms containing the still and connections, whiskey and mash had been rented to one Pat O’Donnell and that the defendant did not know anything about it. Verily, any port in a storm.

TESTIMONY OF THE DEFENDANT.

The testimony of the defendant in chief pertinent hereto is as follows:

“Q. Have you ever used the rooms on the east side of that hall except for renting?

A. That's all to rent.

Q. Were those premises, that is the two rooms on the east side of the hall rented in April, 1922?

A. Yes. sir.

Q. Who had charge of the renting of those rooms?

A. Mrs. Carney had.

Q. Did you pay any personal attention to it?

A. Very little.

Q. Who was occupying those rooms to the east of the hall in April, April 18th, 1922,

A. This man O'Donnell.

Q. Did you rent the premises to him?

A. No. I didn't rent them.

Q. Do or did you know he was making moonshine in those premises?

A. I should say not.

Q. Did you know there was a still in the building at all.

A. No, sir.

Q. Did you know there was any mash in the building?

A. No, sir.

Q. Now, Mr. Carney, were you home the the time the officers called on the 18th?

A. No, sir.

Q. Where were you at that time?

A. I was at the mine working.

Q. At work? A. Yes, sir.

Q. And when you returned home what time was it?

A. About five o'clock in the evening.

Q. Did you see any officers that day? A. Yes.

Q. Who did you see?

A. Mr. Rodda that testified here and Gerry.

Q. Rodda and Gerry up on the 18th?

A. Yes, sir; after I came off shift they were waiting and came into the house right after me." (Tr. 118-119.)

And on cross-examination:—

“Q. You were maintaining this house at 205 West Quartz Street on or about the 18th

of April last year?

Mr. BALDWIN.—Objected to as immaterial; not proper cross-examination.

The COURT.—Ask him if he owned it.

Q. You owned it did you not? A. Yes, sir.

Q. Kept it in repair? A. Yes, sir.

Q. And occupying one side? A. Yes, sir.

Q. In going-in entering your house did you generally go in the front door or back door?

A. Sometimes either way.

Q. You would pass the kitchen where the still was?

A. Yes, sir.

Q. How close would you come to that door?

A. Come right by it.

Q. Almost touch it going by?

A. Yes, sir; the hall there about four feet wide.

Q. You learned the still was in the house?

A. Yes, I found it out.

Q. Who told you that? A. Gerry and Rodda.

Q. Until they told you you never suspected

the still there?

A. No, sir.

Q. Did they tell you also there were seventy gallons of mash? A. They told me they found it.

Q. You never smelled mash?

A. No, sir.

Q. You don't have any trouble with your sense of smell?

A. Well, it isn't the very best.

Q. How long has it been bad?

A. It never was good.

Q. Did it surprise you to learn that that still there and seventy gallons of mash and moonshine whiskey were in a room the door of which you almost touched with your elbow two or three days in passing it.

A. Yes, sir; it surprised me." (Tr. 119-121.)

THE COURT'S CHARGE TO THE JURY.

The Court charged the jury clearly and properly:—

“You are the exclusive judges of the weight of the testimony and credibility of the witnesses. You see the witnesses, you hear them

and observe and take note of their attitude and demeanor. Are they frank and fair or inclined to conceal or distort or misrepresent; do they contradict themselves or are they contradicted by others whom you prefer to believe; are they contradicted by circumstances which so far appeal to your reason that you prefer to believe them rather than the direct statements of any number of witnesses: have they an interest in the case. Circumstances may speak truly where witnesses are testifying untruly."

The jury observed the witness, his manner in testifying, his demeanor on the witness stand. The jury had the unquestioned right to consider the manner in which the defendant, a witness, testified. Does he appear to testify in a candid, open and fair manner? What is his attitude? Are his answers to questions direct or evasive? Is the testimony given in a way to enlighten or to deceive the jury?

Defendant was asked by his counsel at the trial the direct question—

"Have you ever used the room on the east side of that hall except for renting?

His answer was not direct nor frank, but—

"That's all to rent."

Was he candid in his testimony to the jury or did he seek to hide behind the skirts of his wife?

His counsel questioned him:—

“Q. Who had charge of the renting of those rooms?

A. Mrs. Carney had.

Q. Did you pay any personal attention to it?

A. Very little.

Q. Who was occupying those rooms to the east of the hall in April, April 18th, 1922?

A. This man O'Donnell.”

Here was a man who worked at mining. Putting in his eight hour shift, returning home about five o'clock in the afternoon. Would pass the kitchen where the still was. Would come right by the kitchen door.

“Q. Almost touch it going by?

A. Yes, sir; the hall there about four feet wide.

Q. You learned the still was in the house?

A. Yes, I found it out.

Q. Who told you that?

A. Gerrey and Rodda.

Q. Until they told you, you never suspected the still there?

A. No, sir.

Q. Did they tell you also there were seventy

gallons of mash?

A. They told me they found it.”

Yet that hallway was redolent with the odor of mash. He is questioned:—

Q. You never smelled mash?

A. No, sir.

Q. You don't have any trouble with your sense of smell?

Here is a way out—and the defendant quickly seizes upon it. He answers—

A. Well, it isn't the very best.

Q. How long has it been bad?

A. It never was good.

The very recital of the defendant's testimony in cold type is not impressive. How much less must it have been to the jury under the circumstances of this case. If the defendant's sense of smell was so defective, it seemingly would have been easy to prove it. Had he ever been treated for it? Did his wife know of it? No one else testified to it. When asked if he had any trouble with his sense of smell, defendant answered as though he saw a loop hole of escape—a way out, and answered—“Well, it isn't the very best”. And to cinch it, said, “It never was good”.

To the jury such testimony was not candid and

frank, but evasive, with all the earmarks of being untrue.

What did this defendant do after returning home at five o'clock of an afternoon? The house contained only five rooms. To get to the toilet or bathroom, the hallway must be used. The kitchen on the west side of hall was opposite that of the room in which the still was kept. The door of that room was partially open and through it the officer saw the still. It is inconceivable that in such a place, the residence of the defendant, under all the facts and circumstances testified to, that this defendant knew nothing of it.

Is it to be held that a defendant charged with a violation of the National Prohibition Act is to "get by" by a mere disclaimer of knowledge as to things going on in his narrowly confined residence? That, therefore, the law making—(Sec. 21 of the Act)

"Any room, house, *** or place where intoxicating liquor is manufactured, *** kept *** in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, *** a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$1000 or be imprisoned for not more than one year, or both."

does not apply to him?

In the light of the testimony and all the circumstances of the case, well did the Court charge the jury,

“You are not to be hoodwinked and bamboozled by anybody, not by unreasonable testimony if it is unreasonable. Remember the witnesses on either side can swear that black is white if they think they can cause you to credit it or entertain a reasonable doubt, but you are not to be gulled.” (Tr. 132.)

However displeasing to the sensitive ear of counsel, the Court used language expressive and easily understood. To ‘hoodwink’ is “to deceive by false appearance; impose upon; to dissemble.” To ‘bamboozle’ is to “deceive” and “mystify” and to be ‘gulled’ is to be “duped”.

The Court did not say the jury was being ‘hoodwinked, bamboozled and gulled’. They were told not to be. In other words, it was a forceful and expressive way to bring home to the jury their duty to consider and think and reason about the case. They were not to be hoodwinked, “blinded” by unreasonable testimony if it is unreasonable”.

Always the Court is careful to leave it to the judgment of the jury.

“You are not to believe a thing is so simply because some one swears it’s so. *** You determine the true and false no matter from what witness the evidence comes.” (Tr. 133.)

THE DEFINITION OF A REASONABLE DOUBT.

The Court in its charge gave full explanation of a reasonable doubt as follows:

“After reviewing the facts and circumstances and the direct testimony of the witnesses in the case you may have some doubt as to the guilt of the defendant but unless a doubt is reasonable in view of all the circumstances you are bound to find him guilty; at the same time you may have a doubt of his innocence but that does not enable you or justify you to find him guilty unless you have no reasonable doubt of his guilt. A reasonable doubt may be defined after this fashion; if after you have reviewed all the evidence you do not have a judgment that persists in staying with you, that to a very high degree of probability the defendant is guilty, you have a reasonable doubt and must acquit him. On the other hand if after reviewing all the evidence and circumstances your judgment persists that to a very high degree of probability the defendant is guilty you have no reasonable doubt and you are bound to convict him. When I say bound, Gentlemen, there is no compulsion from the Court or anyone; the only things binding upon you are your oath, duty, honor and conscience. You are officers of the Court as you sit there, sworn to perform your duty as honest and conscientious men.” (Tr. 128-9.)

The foregoing definition of a reasonable doubt by the District Court in almost identical wording has been heretofore approved by this Court.

McCurry v. U. S. (9 C. C. A.), 281 Fed. 532.

The Plaintiff in Error was duly tried, convicted and sentenced.

WHEREFORE, Defendant in Error respectfully submits that the conviction and judgment of the District Court should be affirmed.

JOHN L. SLATTERY,
United States Attorney,

RONALD HIGGINS,
W. H. MEIGS,
Assistant United States Attorneys
Attorneys for Defendant in Error.

United States
Circuit Court of Appeals ⁷
For the Ninth Circuit.

J. W. MAXWELL,

Plaintiff in Error,

vs.

EVA L. RICKS,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Western District of Washington,
Northern Division.

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. W. MAXWELL,

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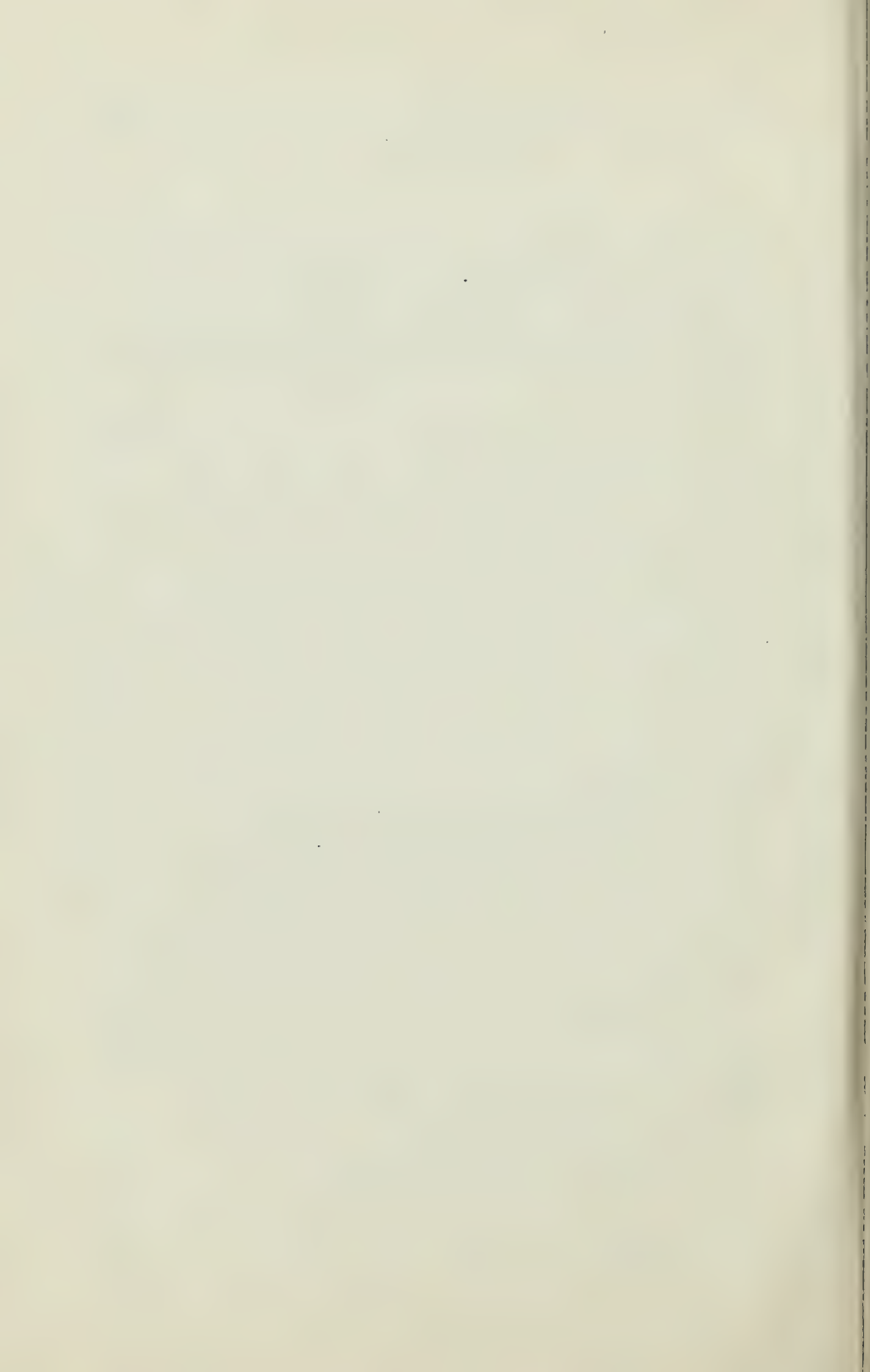
[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Counsel.

CARROLL B. GRAVES, Esq., Attorney for Plaintiff in Error, 607 Central Building, Seattle, Washington.

C. A. RIDDLE, Esq., Attorney for Defendant in Error, 327 Colman Building, Seattle, Washington. [1*]

In the District Court of the United States in and for the Western District of Washington, Northern Division.

No. 6662.

J. W. MAXWELL,

Plaintiff,

vs.

EVA L. RICKS,

Defendant.

G. W. NINEMIRE,

Garnishee Defendant.

Amended Complaint.

Plaintiff complains of defendant as follows:

I.

That on to wit: November the 19th, the said defendant Eva L. Ricks, for valuable consideration, executed and delivered at San Francisco, California, to one J. R. Moore, then and now a resident citizen of the State of Washington, of Seattle, Washing-

*Page-number appearing at foot of page of original certified Transcript of Record.

ton, her two promissory notes in the amount of Five Thousand (\$5,000) Dollars each, with interest payable at the rate of 7 per cent per annum, in terms and figures set out in Exhibits "A" and "B" hereto attached and made part hereof.

II.

That for valuable consideration said J. R. Moore, prior to the maturity of said notes, sold and delivered, endorsing the same in due course to plaintiff herein; then and now a resident citizen of the State of Washington, and that though repeatedly requested said defendant Eva L. Ricks has not paid said principal or interest or any part thereof, and refuses to pay same or any part thereof, and plaintiff has at all times had possession of said notes. [2]

III.

That in order particularly to secure said obligations said defendant tendered and transferred to said J. R. Moore certain security in the nature of a mortgage, true copy of which is attached hereto and made part hereof as Exhibit "C," and which said defendant pretended had a value sufficient to properly secure said obligations, but in truth and in fact the said property represented by said mortgage has no market value, and that the said instrument describing said security will be tendered in court and retransferred to said defendant Eva L. Ricks, and the plaintiff offers hereby to execute any instrument requisite and proper to accomplish said offer at any time on defendant's demand.

IV.

That defendant agreed to pay a reasonable amount as and by way of attorney's fees, and that a reasonable attorney's fee in the premises is Five Hundred (\$500) Dollars.

WHEREFORE plaintiff prays judgment against defendant in the amount of Ten Thousand (\$10,000) Dollars, with interest from November 19, 1920, and for attorneys' fees in the amount of Five Hundred (\$500) Dollars, and for costs herein legitimately to be taxed.

FLICK & PAUL,
Attorneys for Plaintiff. [3]

Exhibit "A."

\$5,000.00

San Francisco, Calif., November 19, 1920.

On or before eight (8) months after date, without grace, I promise to pay to J. R. Moore, or order, the sum of Five Thousand Dollars (\$5,000), with interest thereon after date at the rate of seven per cent (7%) per annum, both principal and interest payable only in lawful money of the United States.

This note is secured by a mortgage of even date herewith.

EVA L. RICKS. [4]

Exhibit "B."

\$5,000.00.

San Francisco, Calif., November 19, 1920.

On or before four (4) months after date, without grace, I promise to pay to J. R. Moore, or order, the sum of Five Thousand Dollars (\$5,000), with interest thereon after date at the rate of seven per cent (7%) per annum, both principal and interest payable only in lawful money of the United States.

This note is secured by a mortgage, of even date herewith.

EVA L. RICKS. [5]

Exhibit "C."

THIS INDENTURE, made the nineteenth day of November, one thousand nine hundred and twenty, between Eva L. Ricks (a widow), of the County of Humboldt, State of California, the party of the first part, and J. R. Moore, of the City of Seattle, State of Washington, the party of the second part, WITNESSETH:

That the party of the first part, for and in consideration of the sum of Ten (\$10) Dollars lawful money of the United States of America, to her in hand paid, the receipt whereof is hereby acknowledged, does by these presents, grant unto the party of the second part, his heirs and assigns forever, all that certain real property situate, lying and being in the County of Del Norte, State of California,

bounded and particularly described as follows, to wit:

The West half of the Northwest quarter of Section 8; the Southwest quarter of the Southwest quarter of Section 5; and the Southeast quarter of the Southeast quarter of Section 6, in Township 13 North of Range 2 East of Humboldt Meridian, containing 160 acres according to the official Plat of the survey of said land by the United States; together with the timber growing thereon.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the rents, issues and profits thereof.

TO HAVE AND TO HOLD the said premises, together with the appurtenances, unto the party of the second part, his heirs and assigns forever.

THIS CONVEYANCE is intended as a mortgage to secure the payment of those two certain promissory notes in the words and figures following, to wit:

\$5,000.00.

San Francisco, Calif., November 19, 1920.

On or before four (4) months after date, without grace, I promise to pay to J. R. Moore, or order, the sum of Five Thousand Dollars (\$5,000.00), with interest thereon after date at the rate of seven per cent (7%) per annum, both principal [6] and interest payable only in lawful money of the United States.

This note is secured by a mortgage of even date herewith.

EVA L. RICKS.

\$5,000.00.

San Francisco, Calif., November 19, 1920.
(Rev. Stamp \$1.00 Cancelled.)

On or before eight (8) months after date, without grace, I promise to pay to J. R. Moore, or order, the sum of Five Thousand Dollars (\$5,000), with interest thereon after date at the rate of seven per cent (7%) per annum, both principal and interest payable only in lawful money of the United States.

This note is secured by a mortgage of even date herewith.

EVA L. RICKS.

and these presents shall be void if such payments be made according to the tenor and effect thereof; but in case default be made in the payment of said principal or any of the interest, upon said promissory notes, as herein provided, then the party of the second part, his executors, administrators and assigns, are empowered to sell said premises, with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and out of the money arising from such sale, to retain the said principal and interest, together with the costs and charges making such sale, and a reasonable amount for attorney's fees which said costs and charges and attorney's fees shall be a charge upon said premises and may be deducted from the proceeds of the sale above authorized; and the overplus, if any there be, shall be paid by the party

making such sale, on demand, to the party of the first part, her heirs or assigns.

This mortgage is also intended to secure, and does hereby secure, the payment of all liens and incumbrances upon said property, and the charges and counsel fee herein mentioned, said counsel fee to become payable and be allowed if suit be commenced to foreclose this mortgage.

In the event the amount due upon said promissory note hereinabove firstly set forth, both principal and interest, is not paid when due, at the option of the holder of said promissory note and this mortgage the amount, both principal and interest, of the promissory note secondly hereinabove set forthwith shall become due and payable.

In the event that the principals of both of said notes are paid within ninety (9) days from date hereof, not interest whatever shall be charged or shall become due or payable upon either of said promissory notes.

IN WITNESS WHEREOF, the party of the first part has hereunto set her hand the day and year first above written.

EVA L. RICKS.

Signed and delivered in the presence of

THEO. F. ROCHE. [7]

State of California,

City and County of San Francisco,—ss.

On this 19th day of November in the year one thousand nine hundred and twenty before me Lloyd Macomber, a notary public, in and for the city and county of San Francisco, personally appeared

Eva L. Ricks (widow) known to me to be the person whose name is subscribed to the within instrument, and she duly acknowledged to me that she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal, at my office in the City and County of San Francisco in the day and year in this certificate first above written.

[Seal] LLOYD MACOMBER,
Notary Public in and for the City and County of
San Francisco, State of California.

State of Washington,
County of King,—ss.

J. W. Maxwell, being first duly sworn on oath says: That he is the plaintiff in the above-entitled action; that he has read the foregoing, knows the contents thereof and believes the same to be true.

J. W. MAXWELL.

Subscribed and sworn to before me this 29th day of May, 1922.

[Notary Seal] HENRY FLICK.
Notary Public in and for the State of Washington,
Residing at Seattle, Wash.

Copy of within amended comp. received and due service of the same acknowledged this 31st day of May, 1922.

C. A. RIDDLE,
Attorney for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. Jun. 13, 1922. F. M. Harshberger,
Clerk. By S. E. Leitch, Deputy. [8]

In the District Court of the United States in and
for the Western District of Washington, North-
ern Division.

No. 6662.

J. W. MAXWELL,

Plaintiff.

vs.

EVA L. RICKS,

Defendant.

G. W. NINEMIRE,

Garnishee Defendant.

Answer to Amended Complaint.

Comes now the above-named defendant, and for
answer to the amended complaint of the plaintiff
herein, denies and alleges as follows:

I.

That defendant admits that on or about the 19th
day of November, 1920, she executed and delivered
to one J. R. Moore, at San Francisco, California,
two promissory notes in the sum of Five Thousand
(\$5000.00) Dollars each, with interest thereon at the
rate of seven (7) per cent per annum, in terms and
figures as set out in Exhibits "A" and "B" attached
to said amended complaint, as alleged in paragraph
I of said amended complaint, but defendant denies
that said notes were given for a valuable considera-
tion, or for any consideration, and denies each and

every of the other allegations being and contained in said paragraph I.

II.

That defendant admits that she has not paid said notes, or either of them, principal or interest, as alleged in paragraph II [9] in said amended complaint; and she denies each and every of the other allegations in said paragraph II.

III.

That defendant admits that in order to secure said promissory notes she executed and delivered to said J. R. Moore security in the nature of a mortgage, a copy of which is attached to said amended complaint as Exhibit "C"; she particularly denies that said security had or has no market value, as alleged in paragraph III in said amended complaint, and she denies each and every other allegation being and contained in said paragraph III.

IV.

That defendant denies that the said promissory notes contained a promise to pay a reasonable amount, or any amount, as and by way of attorneys' fees, and she particularly denies that a reasonable attorneys' fee is Five Hundred (\$500.00) Dollars or any other sum whatsoever, as alleged in paragraph IV of said amended complaint.

By way of affirmative defense and further answer to said amended complaint, defendant alleges:

I.

That at all times mentioned in the amended complaint herein, and in this answer, defendant was, and still is, a resident of the State of California.

II.

That prior to the 19th day of November, 1920, the defendant and J. R. Moore mentioned in the amended complaint were the owners, or purported owners, in undivided interests, of certain lands located and being in the State of California; that the said J. R. Moore became and was desirous of disposing of and selling to defendant [10] his interest therein, and accordingly on or about the 19th day of November, 1920, the defendant, believing the title thereto was good and valid, purchased from the said J. R. Moore his interest or purported interest in said lands, and thereupon executed and delivered to him, as evidence of the unpaid purchase price thereof, three (3) promissory notes in the sum of Three Thousand (\$3000.00) Dollars, Five Thousand (\$5000.00) Dollars and Five Thousand (\$5000.00) Dollars, respectively, and a mortgage hereinafter referred to covering other lands in the State of California owned by the defendant as security therefor.

III.

That at the time of said transaction the said J. R. Moore knew that the title of said lands, and to his interest, or purported interest, therein, was invalid; that he purposely, designedly and fraudulently deceived defendant with reference to his said title, and the invalidity thereof, and fraudulently withheld from defendant the information and knowledge then in his possession concerning the invalidity of such title; that otherwise defendant

would not have purchased the interest, or purported interest, of the said J. R. Moore.

IV.

That not until after the payment by defendant of the first of said promissory notes, to wit, the said note for Three Thousand (\$3000.00) Dollars, did defendant discover the fraud practiced upon her by the said J. R. Moore as aforesaid; that otherwise defendant would not have paid said note; that since discovering said fraud the defendant has refused to make payment of the other said two (2) promissory notes in the sum of Five Thousand (\$5000.00) Dollars each, principal and interest.

V.

That copies of the said two (2) unpaid promissory notes [11] herein sued upon, and of the said mortgage executed simultaneously therewith as security therefor, are set forth as exhibits "A" and "B" to plaintiff's amended complaint, and are by reference made a part hereof.

VI.

That there was no consideration moving from the said J. R. Moore to the defendant for said notes or mortgage, or any or either of them, and the said notes and mortgage, and each and all of them, were wholly without consideration.

VII.

That the plaintiff, J. M. Maxwell, never paid value for said promissory notes, or either of them, and neither of the said promissory notes was acquired by the plaintiff in due course, but at all times the plaintiff was acting for and in behalf of, and as the

agent of, the said J. R. Moore, the payee of said notes, and the said J. R. Moore is the actual and beneficial owner of said notes and mortgage.

By way of a second affirmative defense to said amended complaint, defendant alleges:

I.

That at all times in said amended complaint and in this answer mentioned, defendant was, and still is, a resident of the State of California.

II.

That on or about the 19th day of November, 1920, defendant executed and delivered to J. R. Moore two (2) certain promissory notes in the sum of Five Thousand (\$5000.00) Dollars each, and a mortgage covering certain timber lands lying and being in the County [12] of Del Norte, State of California, as security therefor; that copies of said promissory notes and of said mortgage are set forth and attached to plaintiff's amended complaint, and are marked Exhibits "A" "B," and are by reference thereof hereby made a part of this answer.

III.

That at the time of the execution and delivery of said promissory notes and mortgage, the said timber lands described in and covered by said mortgage were, and are, of the reasonable worth and value of to wit, the sum of Twenty Thousand (\$20-000.00) Dollars.

IV.

That the negotiations leading up to said transaction involving the execution and delivery of said promissory notes and mortgage, and the consumma-

tion thereof, occurred and took place in the State of California, and the parties participating therein, namely, the defendant and the said J. R. Moore, were at all of said times in the said State of California.

V.

That Article X, Chapter I, of the California Code of Civil Procedure, relating to actions for the foreclosure of mortgages, provides among other things as follows; to wit:

“Section 726.—Proceedings in Foreclosure Suits. There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with this Chapter. In such action the court may, by its judgment, direct the sale of the incumbered property (or so much thereof as may be necessary), and the application of the proceeds of the sale to the payment of the costs of court, and the expenses of the sale, and the amount due plaintiff, including, where the mortgage provides for the payment of attorney’s fees, such sum for such fees as the court shall find reasonable, not exceeding the amount named in the mortgage.”

That said Chapter and said Section and provisions at all times herein mentioned were, and still are, in full force and effect and set forth [13] the law as it then existed, and now exists, in the State of California relating to actions for the foreclosure of mortgages and for the recovery of debts.

VI.

That no action at law or in equity has ever been begun on said mortgage, or for the foreclosure thereof, by either the plaintiff or by the said J. R. Moore, or by anyone in their, or either of their behalf, in the State of California, or in any other state or tribunal.

VII.

That this Court has no jurisdiction of the subject matter of this action.

WHEREFORE, having answered the amended complaint of the plaintiff herein, defendant demands that said cause be dismissed; that she go hence without day, and that she have her costs and disbursements herein incurred.

C. A. RIDDLE,

Attorney for Defendant.

Office and Post Office Address:

Suite 327 Colman Bldg.,

Seattle, Washington. [14]

United States of America,

Western District of Washington,

County of King,—ss.

C. A. Riddle, being first duly sworn on oath, says: That he is the attorney for the defendant in the above-entitled action; that he has read the foregoing answer, knows the contents thereof and believes the same to be true; that he makes this affidavit and verification for and on behalf of the defendant, and as her attorney of record in said cause, for the reason that she is without the State of

Washington, being a resident of the State of California.

C. A. RIDDLE.

Subscribed and sworn to before me this 25th day of August, 1922.

[Notary Seal] JAMES KIEFER,
Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of the foregoing answer to amended complaint received and due service admitted, this 25th day of August, 1922.

FLICK & PAUL,
Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 25, 1922. F. M. Harshberger, Clerk. [15]

In the District Court of the United States in and for the Western District of Washington, Northern Division.

No. 6662.

J. W. MAXWELL,

Plaintiff,

vs.

EVA L. RICKS,

Defendant,

G. W. NINEMIRE,

Garnishee Defendant.

Reply.

For reply to the affirmative defenses and further answers to amended complaint submitted by defendant Eva L. Ricks, plaintiff herein admits, denies and alleges as follows:

I.

For reply to paragraph I of said first affirmative defense, plaintiff admits the same.

II.

For reply to paragraph II of said first affirmative defense plaintiff has not information sufficient to form a basis for belief and therefore denies the same and each and every allegation contained therein.

III.

For reply to paragraph III of said first affirmative defense, plaintiff has not information sufficient to form a basis for belief and therefore denies the same and each and every part thereof; and further asserts that in truth and in fact said defendant Eva L. Ricks, with others, has organized a corporation which is selling to the public the lands referred to in paragraph III of said first affirmative defense on the same title and without any correction having been made therein at any time by said Eva L. Ricks [16] and further that said Eva L. Ricks, defendant herein, was the primary owner of the lands mentioned in paragraph III and with full knowledge of the title induced said J. R. Moore to become interested and did interest him in said lands.

IV.

For reply to paragraph IV of said first affirmative defense plaintiff has not information sufficient to form a basis for belief and therefore denies the same and each and every part thereof, excepting that plaintiff admits the allegations that defendant Eva L. Ricks has refused to pay the notes in said paragraph referred to.

V.

Admits the allegations contained in paragraph V of said first affirmative defense.

VI.

For reply to paragraph VI of said first affirmative defense plaintiff has no information sufficient to form a basis for belief and therefore denies the same and each and every part thereof.

VII.

For reply to paragraph VII of said first affirmative defense specifically denies each and every allegation therein contained.

VIII.

For reply to paragraph 1 of second affirmative defense plaintiff admits the same.

IX.

For reply to paragraph II of said second affirmative defense plaintiff admits same.

X.

For reply to paragraph III of said second affirmative defense plaintiff denies the allegations therein contained.

XI.

For reply to paragraph IV of said second affirma-

tive defense [17] plaintiff has no information sufficient to form a basis for belief and therefore denies the same and each and every part thereof.

XII.

For reply to paragraph V of said second affirmative defense plaintiff has no information relating to the allegations therein set forth sufficient to form a basis for belief and therefore denies the same.

XIII.

That plaintiff admits the allegations contained in paragraph VI of said second affirmative defense but again alleges that the lines mentioned in said second affirmative defense are without value and were without value at the time of the transactions therein recited, and that a quitclaim deed of said property has duly been filed with the Clerk of the Court above-entitled with directions in writing to deliver same to defendant Eva L. Ricks, upon demand.

XIV.

For reply to paragraph VII of said second affirmative defense plaintiff denies allegations therein contained and asserts that this action is an action on a personal debt of said defendant Eva L. Ricks and not an action in foreclosure.

WHEREFORE plaintiff prays judgment against defendant in accordance with the prayer of the amended complaint now on file in this court.

FLICK & PAUL.

State of Washington,
County of King,—ss.

J. W. Maxwell, being first duly sworn, on oath says: That he is the plaintiff in the above-entitled action: that he has read the foregoing reply, knows the contents thereof and believes the same to be true.

J. W. MAXWELL.

Subscribed and sworn to before me this 25th day of August, 1922.

[Notary Seal]

HENRY FLICK,

Notary Public in and for the State of Washington,
Residing at Seattle, Wash.

Copy of within reply received and due service of the same acknowledged this 25th day of Aug., 1922.

C. A. RIDDLE,

Attorney for Deft. [18]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 26, 1922. F. M. Harshberger, Clerk. [19]

In the District Court of the United States, Western
District of Washington, Northern Division.

No. 6662.

J. W. MAXWELL,

Plaintiff,

vs.

EVA L. RICKS,

Defendant,

G. W. NINEMIRE,

Garnishee Defendant.

Decision.

Filed Jan. 18, 1923.

EDWIN H. FLICK, Esq.,

ALFRED J. SCHWEPPE, Esq.,

For Plaintiff,

SULLIVAN & SULLIVAN,

THEO. J. ROCHE, Esq.,

C. A. RIDDLE, Esq.,

For Defendant.

CUSHMAN, D. J.—The defendant, in California, executed notes secured upon real estate in California, each of which notes recited:

“This note is secured by mortgage of even date.”

Suit is brought in this court upon the notes, by a purchaser before maturity, plaintiff, at the time of purchase, knowing the mortgage was upon land in California. The complaint alleges that the land

mortgaged has no market value and tenders defendant "the instrument describing said security," by which the mortgage is evidently meant. Defendant pleads the following statutes of California:

"Sec. 726. Proceedings in foreclosure suits. There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with this Chapter. In such action the court may, by its judgment, direct the sale of the incumbered property (or so much thereof as may be necessary), and the application of the proceeds of the sale to the payment of [20] the costs of court, and the expenses of the sale, and the amount due plaintiff, including, where the mortgage provides for the payment of attorney's fees, such sum for such fees as the court shall find reasonable, not exceeding the amount named in the mortgage."

Defendant alleges the lands mortgaged to be of the reasonable worth and value of \$20,000. No action or suit has ever been begun for the foreclosure of the mortgage. The evidence has shown the land mortgaged to be of considerable value.

By plaintiff, it is contended that the foregoing statute relates solely to the remedy and doesn't inhere in the contract and, therefore, a suit may be maintained in Washington on the notes, alone. Defendant contends that, the notes and mortgage having been executed in California and the land mort-

gaged being in California, the right under the statute to have the mortgaged realty devoted to the satisfaction of the notes before defendant is harassed further inheres in the contract and that plaintiff cannot waive it, and that, for that reason, the suits should be dismissed.

The Court deems defendant's contention to be the law applicable to the situation. While the statute, in form, relates to the remedy, yet it gives defendant a right to have the mortgaged property exhausted before she is forced to pay anything further, and, the contract having been made in view of the statute, the latter forms a part thereof. Any public policy favoring the unimpaired negotiability of such instruments is outweighed by the consideration that the state of a man's residence should not be made for him a house of refuge. The refusal of the courts of other jurisdictions to give a liberal construction to laws enacted by such a state to protect its resident contract debtors, it is perfectly clear, would not more [21] closely knit the bonds of union. If plaintiff secured judgment in this suit, under the full faith and credit clause of the Constitution, he could sue upon his judgment in California and resort to any property of the defendant, not exempt, for its satisfaction, thereby easily defeating the purpose of the law.

The following cases, which have been called to the Court's attention, are not controlling for reasons which may be briefly stated:

London & San Francisco Bank vs. Dexter Horton Co., 126 Fed. 593 (9th C. C. A.).

The land mortgaged was situated in Washington. The California statute was held not to apply.

Dolbear vs. Foreign Mines Devel. Co., 196 Fed. 646 (9th C. C. A.).

The defense was not one made by the mortgagor, a corporation, but was sought to be invoked by a stockholder, sued upon his liability as stockholders of the corporation for its debts.

Mantle vs. Dabney, 47 Wash. 394.

The note was given in Montana. The land mortgaged was in California. The Court held a similar statute of Montana would not defeat plaintiff's action upon the note in a Washington court.

Felton vs. West, 36 Pac. 676, 102 Cal. 266.

The land mortgaged was in Oregon. The statute was held to apply only to actions to recover debts secured by mortgage upon land in California.

Denver Stockyards Bank vs. Martin, 170 Pac. 428, 177 Cal. 223.

The note was given in Colorado and was secured by a mortgage in Colorado. Suit was brought in California.

Martin vs. Becker, 146 Pac. 625, 169 Cal. 30.

The statute was held to be for the benefit of the primary debtor and held not to defeat the foreclosure of a mechanic's lien also [22] securing the mortgage.

Savings Bank vs. Central Market, 54 Pac. 273, 22 Cal. 24.

The plaintiff was the holder of a second mortgage upon property which had been exhausted upon the foreclosure of the first mortgage.

The following decisions of the California Supreme Court support the defense and are binding upon this court.

Barbieri vs. Remelli, 84 Cal. 154, 23 Pac. 1086,

In the foregoing case the defense was held good, even though the property mortgaged proved valueless.

Meyer vs. Weber, 65 Pac. 1110, 133 Cal. 681, 685;

Bartlett vs. Cottle, 63 Cal. 366;

Ould vs. Stoddard, 54 Cal. 615;

Gnarini vs. Swiss American Bank, 121 Pac. 726, 162 Cal. 181;

See, also,

27 Cyc. 1274-J, 2; 1275, and 1276.

On account of the conclusion reached, the other questions involved need not be considered.

Findings and judgment for defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 18, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [23]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 6662.

J. W. MAXWELL,

Plaintiff,

vs.

EVA L. RICKS,

Defendant.

G. W. NINEMIRE,

Garnishee Defendant.

Judgment.

The above-entitled cause having come on duly and regularly for trial on the 20th day of December, 1922, the trial having been begun and having proceeded on said date and having been continued over and completed on the 21st day of December, 1922, the plaintiff being present in court and being represented by Edwin H. Flick and Alfred Schweppe, his attorneys, and the defendant appearing in person and being represented by C. A. Riddle, her attorney, and a jury having been waived by written stipulation entered in said cause, and witnesses having been sworn and examined on behalf of the plaintiff and of the defendant, and a presentation of said cause thereafter having been made and argued by the respective counsel for said plaintiff and said defendant, and the Court having taken said cause under advisement, and having on the 18th day of January, 1923, found for Eva L. Ricks, the de-

fendant upon the ground that there can be no recovery upon the notes sued upon because said notes were executed in the State of California and were secured by a mortgage on lands in California, of which the plaintiff had knowledge, and by the laws of California suit of foreclosure must first be brought in that state and the mortgage security exhausted before the initiation [24] of any other suit or proceeding; and the Court being fully advised in the premises,

NOW, THEREFORE, IT IS HEREBY ORDERED, CONSIDERED AND ADJUDGED, that said cause be, and the same is hereby, dismissed, and that the defendant do have and recover her costs and disbursements against J. W. Maxwell, plaintiff in said action, to be taxed.

Done in open court this 8th day of February, 1923.

EDWARD E. CUSHMAN,
Judge.

Approved:

CARROLL B. GRAVES.

EDWIN H. FLICK.

Exceptions allowed.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 8, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [25]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 6662.

J. W. MAXWELL,

Plaintiff,

vs.

EVA L. RICKS,

Defendant.

Petition for Writ of Error.

To the Honorable Judge of the above-entitled
Court:

The above-named plaintiff feeling aggrieved by the judgment rendered and entered in the above-entitled cause and court on the 8th day of February, 1923, hereby petitions the Court for an order allowing him to prosecute a writ of error to the Circuit Court of Appeals of the United States, for the Ninth Circuit, at the City of San Francisco, California, for the reasons set forth in the assignment of errors filed herewith, and he prays that a writ of error be allowed in this behalf, that citation issue as provided by law and that an order be made fixing the amount of security to be given by plaintiff, and upon giving such bond as may be required, that such further proceedings be had as provided by law and by the rules of the said Circuit Court of Appeals.

CARROLL B. GRAVES,

Attorney for Plaintiff and Petitioner.

Writ of error granted and allowed upon bond being given as required by law for the sum of \$300.00.

Dated this 1st day of August, 1923.

JEREMIAH NETERER,

Judge. [26]

Acceptance of service of within petition for writ of error acknowledged this 1st day of August, 1923.

C. A. RIDDLE,

Attorney for Deft.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 1, 1923. F. M. Harshberger, Clerk. [27]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 6662.

J. W. MAXWELL,

Plaintiff,

vs.

EVA L. RICKS,

Defendant.

Assignments of Error.

Now comes J. W. Maxwell, plaintiff in the above-entitled cause and court, and as plaintiff in error, and in connection with his petition for a writ of error in this cause, assigns the following errors occurring upon the trial of said cause, and upon which he relies to reverse the judgment entered herein:

1. The Court erred in finding and adjudging that plaintiff could not recover in the above-entitled cause and court upon the notes in suit because said notes were executed in the State of California and secured by a mortgage on lands in said state, and that by the laws of California foreclosure suit must be brought first in that state and the mortgage securities exhausted before the commencement of any other suit or proceeding.

2. The Court erred in holding and deciding that no recovery could be had upon the notes in suit in the above-entitled court because mortgage foreclosure had not been brought in the State of California and the mortgage securities for said notes had not first been exhausted in a foreclosure suit and sale.

3. The Court erred in holding and deciding that, by the laws of the State of California, an action upon the notes in suit could not be maintained in the above-entitled court unless and [28] until the mortgage security had first been exhausted by foreclosure and sale in the State of California and under the laws thereof.

4. The Court erred in holding and deciding that the above-entitled court had no jurisdiction to enter judgment upon the notes in suit, and in dismissing the action and entering judgment against the plaintiff because of said alleged want of jurisdiction.

CARROLL B. GRAVES,

Attorney for Plaintiff and Plaintiff in Error.

Acceptance of service of within assignments of error acknowledged this 1st day of August, 1923.

C. A. RIDDLE,

Attorney for Defendants.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 1, 1923. F. M. Harshberger, Clerk. [29]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 6662.

J. W. MAXWELL,

Plaintiff,

vs.

EVA L. RICKS,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, That J. W. Maxwell, plaintiff in the above-entitled cause of action, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Eva L. Ricks, defendant in the above-entitled cause, in the sum of Three Hundred (\$300.00) Dollars, to be paid to the said Eva L. Ricks, her heirs, executors and administrators, for the payment of which, well and truly to be made, the said principal and said surety bind themselves and each of them, and each of their heirs, executors,

administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 1st day of August, 1923.

WHEREAS, the principal herein, being the plaintiff in the above-entitled cause of action, has obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, to reverse the judgment in the above-entitled court and cause, rendered and entered in favor of the defendant therein and against the plaintiff therein;

NOW, THEREFORE, The condition of this obligation is such, that if the above-bounden principal shall prosecute said writ [30] of error and answer all damages and costs, if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

J. W. MAXWELL,
Principal.

By Carroll B. Graves,
His Attorney.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,

Surety.

[Corporate Seal]

By A. W. Whalley,
Atty. in Fact.

The within bond is approved as to sufficiency and form, this 1st day of August, A. D. 1923.

JEREMIAH NETERER,
District Judge.

Acceptance of service of within bond on writ of error acknowledged this 1st day of August, 1923.

C. A. RIDDLE,
Attorney for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 1, 1923. F. M. Harshberger, Clerk. [31]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 6662.

J. W. MAXWELL,

Plaintiff,

vs.

EVA L. RICKS,

Defendant.

Praeipie for Transcript of Record.

To the Clerk of the Above-entitled Court:

Please prepare a transcript of record for use in your return to the writ of error herein, which transcript shall include the following:

1. Amended complaint.
2. Answer to amended complaint.
3. Reply.

4. Final judgment.
5. Opinion of the Court.
6. Petition for writ of error and the order allowing said writ and fixing bond.
7. Assignments of error.
8. Bond on writ of error and approval.
9. Citation.
10. Writ of error.
11. This praecipe.
12. Original citation and writ of error.
13. Clerk's certificate.

Dated this 11th day of August, 1923.

CARROLL B. GRAVES,

Attorney for Plaintiff and Plaintiff in Error.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 11, 1923. F. M. Harshberger, Clerk. [32]

In the United States District Court for the Western District of Washington, Northern Division.

No. 6662.

J. W. MAXWELL,

Plaintiff,

vs.

EVA L. RICKS,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 32, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to writ of error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.), for making record, certificate or return, 77
folios at 15¢ \$11.55

Certificate of clerk to transcript of record, 4 folios at 15¢60
Seal to said certificate20

I hereby certify that the above cost for preparing and certifying record, amounting to \$12.35, has been paid to me by attorney for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and the original citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 27th day of August, 1923.

[Seal]

F. M. HARSHBERGER,
Clerk United States District Court, Western District of Washington.

By Frank L. Crosby, Jr.,
Deputy Clerk. [34]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. —.

J. W. MAXWELL,

Plaintiff,

vs.

EVA L. RICKS,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States of America
to the Judges of the District Court of the
United States for the Western District of
Washington, Northern Division, GREETING:

Because of the record and proceedings, as also
in the rendition of the judgment of the plea which
is in the said District Court before you, or some of
you, between J. W. Maxwell, plaintiff, and Eva L.
Ricks, defendant, a manifest error hath happened,
to the great damage of the said J. W. Maxwell, as
is said and appears by the complaint, we being will-
ing that such error, if any hath been, should be duly
corrected and full and speedy justice done to the
party aforesaid, in this behalf, do command you,
if any judgment be therein given, that then, under
your seal, distinctly and openly, you send the record
and proceedings aforesaid, with all things concern-
ing the same, to the United States Circuit Court
of Appeals for the Ninth Circuit, at the court-
rooms of said court in the city of San Francisco,
in the State of California, together with this writ,
so that you have the same at the said place before
the Justice aforesaid, within thirty days from the
1st day of August, 1923, that the record and pro-
ceedings aforesaid being inspected, the said United
States Court of Appeals may cause further to be
done herein to correct that error, what of right
and according to [35] the law and custom of
the United States ought to be done.

WITNESS, the Honorable WM. H. TAFT, Chief Justice of the Supreme Court of the United States, this 1st day of August, in the year of our Lord one thousand nine hundred and twenty-three.

[Seal]

F. M. HARSHBERGER,
Clerk of Said District Court of the United States,
for the Western District of Washington. [36]

Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 1, 1923. F. M. Harshberger, Clerk. By _____, Deputy.

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. —.

J. W. MAXWELL,

Plaintiff,

vs.

EVA L. RICKS,

Defendant.

Citation.

United States of America,—ss.

To Eva L. Ricks, defendant in the above-entitled
action, GREETING:

You are hereby cited and admonished to be and appear in United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, State of California, within thirty (30) days from the date of this citation, pursuant to a

writ of error filed in the Clerk's office of the District Court of the United States, for the Western District of Washington, Northern Division, wherein the plaintiff in the above-entitled cause is the plaintiff in error, and you, as defendant in said cause, are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, United States District Judge for the District of Western Washington, this 1st day of August, 1923.

JEREMIAH NETERER,

Judge.

Service of foregoing citation and receipt of a copy thereof acknowledged this 1st day of August, 1923.

C. A. RIDDLE,

Attorney for Eva L. Ricks, Defendant and Defendant in Error. [37]

Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 1, 1923. F. M. Harshberger, Clerk. By _____, Deputy.

[Endorsed]: No. 4088. United States Circuit Court of Appeals for the Ninth Circuit. J. W. Maxwell, Plaintiff in Error, vs. Eva L. Ricks, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed August 29, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4088.

United States
Circuit Court of Appeals
For The Ninth Circuit

J. W. MAXWELL,

Plaintiff in Error,

—vs.—

EVA L. RICKS,

Defendant in Error.

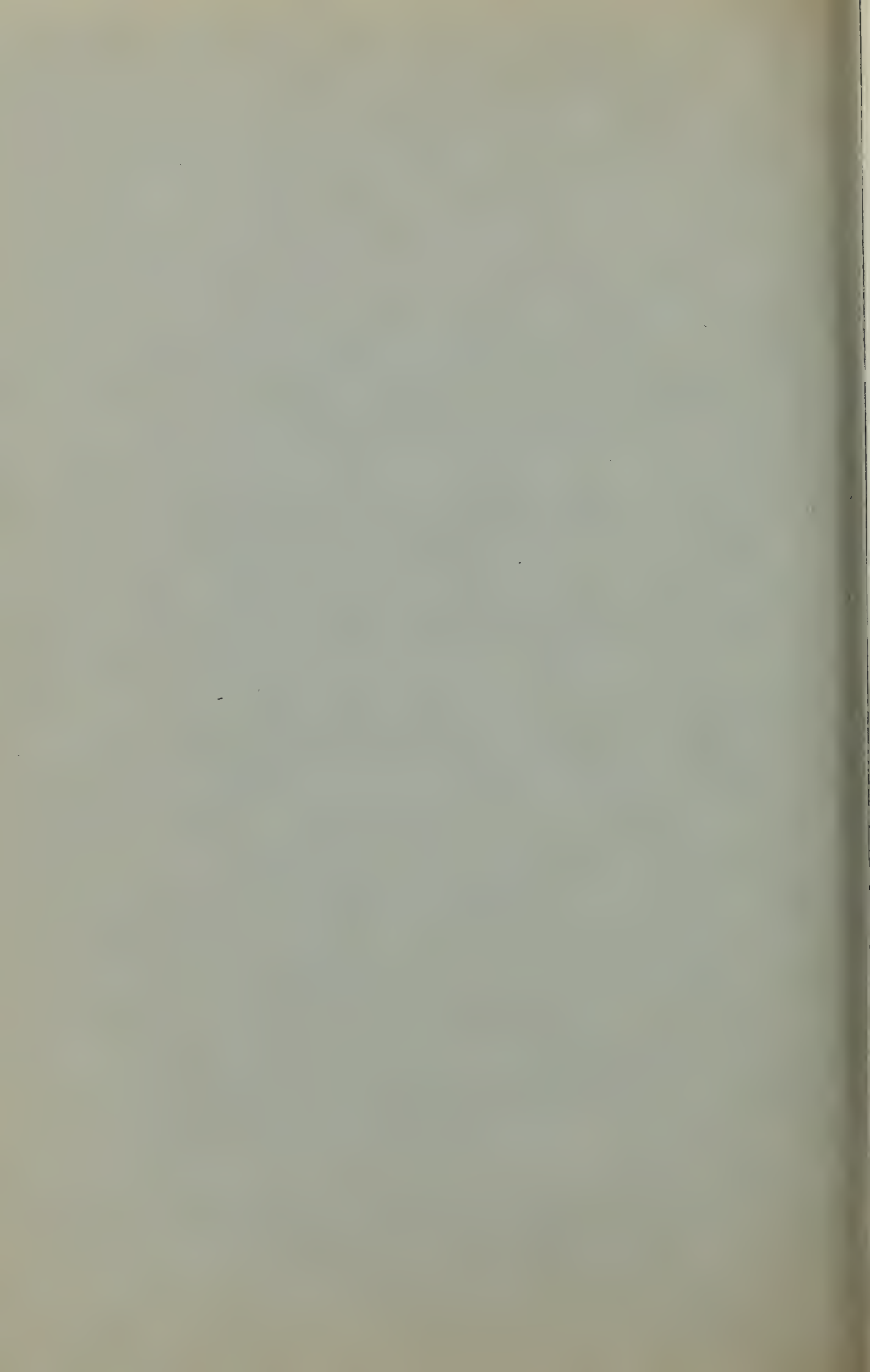
UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT OF THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

BRIEF OF PLAINTIFF IN ERROR

CARROLL B. GRAVES,

Attorney for Plaintiff in Error.

Central Building, Seattle, Washington.



No. 4088.

United States
Circuit Court of Appeals
For The Ninth Circuit

J. W. MAXWELL,

Plaintiff in Error,

—vs.—

EVA L. RICKS,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT OF THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

BRIEF OF PLAINTIFF IN ERROR

CARROLL B. GRAVES,

Attorney for Plaintiff in Error.

Central Building, Seattle, Washington.

United States
Circuit Court of Appeals
For The Ninth Circuit

J. W. MAXWELL,

Plaintiff in Error,

—vs.—

EVA L. RICKS,

Defendant in Error.

No. 4088

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT OF THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

BRIEF OF PLAINTIFF IN ERROR

BRIEF OF PLAINTIFF IN ERROR

Plaintiff in error, as endorsee, sued upon two promissory notes, for \$5000.00 each, executed and delivered by defendant in error to another at San Francisco, on November 19, 1920. At the time of the execution and delivery of the notes, the defendant in error executed and delivered to the promisee a mortgage upon certain real estate in California as security for their payment, which mortgage plaintiff in error offers to transfer to

defendant in error by proper instrument. Record, pp. 1-7.

Article X, Chapter I, California Code of Civil Procedure, relating to actions in the California courts, provides as follows:

“Section 726.—PROCEEDINGS IN FORECLOSURE SUITS. There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with this Chapter. In such action the court may, by its judgment, direct the sale of the incumbered property (or so much thereof as may be necessary), and the application of the proceeds of the sale to the payment of the costs of court, and the expenses of the sale, and the amount due plaintiff, including, where the mortgage provides for the payment of attorney’s fees, such sum for such fees as the court shall find reasonable, not exceeding the amount named in the mortgage: and if it appears from the sheriff’s return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien upon the real estate of such judgment debtor, as in other cases in which execution may be issued.”

It was contended by answer, and otherwise, that, since no foreclosure of the mortgage had been

sought or had, the court was without jurisdiction to render judgment. Record, pp. 14 and 15.

The district court sustained the position assumed by defendant in error and ordered the action dismissed. Record, pp. 21-25.

Judgment was then entered dismissing the action upon the ground that foreclosure must first be brought in California, and the mortgage security exhausted, before the initiation of any other suit or proceedings. Record, pp. 26 and 27.

The sole question arising here is whether the district court correctly construed the California statute, in holding that the statute ousted it of jurisdiction.

SPECIFICATIONS OF ERROR

I

The district court erred in holding and deciding that it was without jurisdiction to enter judgment upon the notes in suit, and in entering judgment of dismissal because of said want of jurisdiction, based upon the ground that the California statute ousted it of jurisdiction.

II

The district court erred in holding and deciding that plaintiff in error could not maintain the instant action, upon the ground that suit for foreclosure of the mortgage must be had in the State of California, and that no action would lie in this state and in the district court herein upon the notes endorsed to and held by plaintiff in error.

BRIEF OF ARGUMENT

The courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They can not abdicate their authority or duty in any case in favor of another jurisdiction.

Watson v. Tarpley, 18 How. 517 (15 L. ed. 509);

Hyde v. Stone, 20 How. 170 (15 L. ed. 874);

Chicot County v. Sherwood, 148 U. S. 529 (37 L. ed 546);

Harrison v. St. Louis &c. Co., 232 U. S. 318;

Lincoln County v. Luning, 133 U. S. 529 (33 L. ed. 766).

The right to contract the debt and to issue the promissory notes was not created or conferred by the statute of California. That right and the right to sue for recovery are common law rights, and the action is, and always has been, a transitory one. Venue and procedure can not be controlled by a state except in its own courts.

Atchison &c. Co. v. Sowers, 213 U. S. 55 (53 L. ed. 695);

Simon v. Southern Ry. Co., 236 U. S. 115;

Tennessee Coal &c. Co. v. George, 233 U. S. 353;

Cable v. U. S. Life Ins. Co., 191 U. S. 288, at 306.

The quoted statute is procedural only. It refers

to actions brought in the courts of California for the purpose of foreclosing mortgages upon property situated in that State. Its object was to prevent a multiplicity of suits and reflects the local policy as to remedies, but does not undertake to control the exercise of jurisdiction elsewhere, or to create or limit a contract obligation.

Ould v. Stoddard, 54 Cal. 613;

Blumberg v. Birch, 99 Cal. 416, 34 Pac. 102;

Felton v. West, 102 Cal. 266, 36 Pac. 676;

London &c. Bank v. Dexter Horton Co., 126 Fed. 593 (9th C. C. A.);

Mantle v. Dabney, 47 Wash. 394.

The original transaction between the parties consisted of two things, the principal one of which being the debt evidenced by the notes, while the mortgage given to secure the debt was the incident. The parties could have done any of three things: first, create the debt; second, create the debt and evidence it by the notes; and third, create the debt, evidence it by the notes, and secure the payment *pro tanto* the value of the property mortgaged. If they had done only the first of these things, or the first and second, there can be no question but that an action thereon would lie in the district court, *i. e.*, the judicial power vested in that court would extend to the controversy between the parties. But it is contended that, because of the mortgage and the statute of California, the court is deprived of its judicial power in the premises for the reason that

the statute becomes a part of the contract. However, the statute does not confine the creditor to his security, nor cancel the obligation in excess of the value thereof, nor make the security the principal thing, but provides for the enforcement of debts even though the security may prove insufficient, thereby still leaving the debt the principal thing and the security as incidental thereto; and, this being true, the statute is one of procedure only and does not inhere in the contract and has no extra-territorial effect.

The right to sue upon the debt is as old as the common law, existed at the time of the adoption of the Federal Constitution, and no State can deprive the United States courts of the right to exercise the judicial power vested in them by the Constitution and the Acts of Congress in pursuance thereof.

“Of course, the jurisdiction of the United States Courts could not be lessened or increased by state statutes regulating venue or establishing procedure.”

Simon v. Southern Ry. Co., 236 U. S. 115.

“It may not be doubted that the judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority, is a power wholly independent of state action, and which therefore the several states may not by any exertion of authority, in any form, directly or

indirectly destroy, abridge, limit or render inefficacious.”

Harrison v. St. Louis & S. F. R. Co., 232 U. S. 318.

“No stipulation or agreement, founded on a state statute, or otherwise, which the company may have entered into, could prevent the removal of the case in the exercise of its constitutional rights.”

Cable v. U. S. Life Ins. Co., 191 U. S. 288, at 306.

Any other view of the matter would prevent citizens of other states from resorting to the Federal Courts for the enforcement of their claims and limit them to the special mode of relief prescribed by a State. The jurisdiction of the Federal Courts, in this manner, could be indirectly defeated. It will not be denied that the laws of the several states are of binding authority upon their domestic tribunals, but it is equally clear that those laws cannot affect, either by enlargement or diminution, the jurisdiction vested in the courts of the United States, nor destroy or control the rights of parties litigant to resort to these courts.

Watson v. Tarpley, *supra*.

The courts of the United States are bound to proceed to judgment in every case to which their jurisdiction extends, and they cannot abdicate their authority in favor of another jurisdiction. This principle has been steadfastly adhered to.

Chicot County v. Sherwood, *supra*.

There are many instances where right and remedy are so united that the right cannot be enforced except in the manner and before the tribunal designated by the act. This rule is well settled in those instances where the provision for the liability is coupled with a provision for a special remedy which alone must be employed. But if a common law right of action exists, or if a state creates a cause of action which is transitory, the state cannot destroy the right to sue on such a cause of action in any court having jurisdiction. A transitory cause of action can be maintained in another court even though the statute creating the cause of action provides that the action must be brought in local domestic courts.

Atchinson &c. Co. v. Sowers, supra.

Tennessee Coal &c. Co. v. George, supra.

It will be conceded that the general rule is, unless abolished by special statute, that a creditor, holding a note secured by mortgage, may ignore or waive his security and bring action upon the note alone.

While the law of the place governs the validity and interpretation of the contract, the remedy for its enforcement is governed by the law of the forum in which the remedy is sought.

5 R. C. L. 1042;

8 Corpus Juris, 94.

The California statute is found in the Code of Procedure of that State, remedies alone are there considered, and it is manifest that the section in

question relates exclusively to the remedy. No new obligation or liability is created; no attempt is made to destroy the common law right of action upon the debt evidenced by the note, or to limit the liability upon the contract debt or obligation. For the purpose of limiting the number of actions which might be had in the courts of that state upon the note and mortgage, the section was enacted.

The California Supreme Court has directly held that a valid suit could be maintained in another state upon a note given in California and secured by a mortgage on California lands. In that case the note was sued upon in Ohio, judgment obtained, but no recovery was had upon execution. Suit to foreclose the mortgage was then brought in California, and it was held that because of the statute it could not maintain the second action, in the State of California, and that the mortgage was waived by the Ohio action.

Ould v. Stoddard, 54 Cal. 613.

It has also been held that where there was a decree of foreclosure without personal service, so that no judgment for deficiency could be entered in the foreclosure suit, the amount made by foreclosure sale would be treated as a payment upon the note, and a second action could be brought on the note for the balance.

Blumberg v. Birch, 99 Cal. 416; 34 Pac. 102.

It will be seen by a consideration of the last two cases, that the California court expressly recog-

nized the existence of the debt, the right of action upon it, and that the statute merely controlled the remedy in courts of that state. And, in still a later case, the following statement is made in construing the section in question.

“It is hardly necessary to say that the action for the foreclosure of this mortgage, brought in the State of Oregon, was not the action referred to in this section of the Code of Civil Procedure, nor was that action brought under any other provisions of our Code. *This section refers to actions brought in the courts of California* for the purpose of foreclosing mortgages upon property situate in the State of California.”

Felton v. West, 102 Cal 266; 36 Pac. 676.

It must be conceded that the law of California now is, as construed by its courts, that if one brings a suit upon a note and mortgage in the courts of that state, he must first exhaust the mortgage security and then proceed upon a deficiency judgment, if any; but if he sues in the courts of another state upon the debt or note, and obtains judgment, he has conclusively waived the mortgage security because the statute does not permit a second action. And, in very truth, what is there in the statute, or in the declared policy of the statute, which forbids such construction?

It was answered by the lower court that, if plaintiff secured judgment in this suit, he could sue upon his judgment in California and resort to

any property of the defendant for its satisfaction, thereby easily defeating the purpose of the law. In what respect would such a procedure defeat the purpose of the law? The purpose of the statute was not to protect the debtor from having other property levied upon. The mischief sought to be remedied was the practice of bringing two actions when all rights could readily be enforced in one.

Felton v. West, supra.

Ould v. Stoddard, supra.

If the plaintiff in error had sued on the note and mortgage in California, but was unable to obtain personal service upon the defendant, and a sale of the mortgaged property upon foreclosure was had, and the amount made on sale was credited as a payment upon the note, he would have been entitled to sue upon the note for any balance either in California, or other state in which he could obtain service of the person.

“It seems to us, therefore, that in a case like this, the amount realized from the proceeds of the sale may properly be treated as a payment on the note, and that an action thereon may be maintained to recover the balance left unpaid. * * * and whether it be said to be based on the note or on an indebtedness resulting from the facts stated, is immaterial.”

Blumberg v. Birch, supra.

Moreover, if foreclosure on personal service had been had in California, and a deficiency judgment resulted, such deficiency judgment could be sued

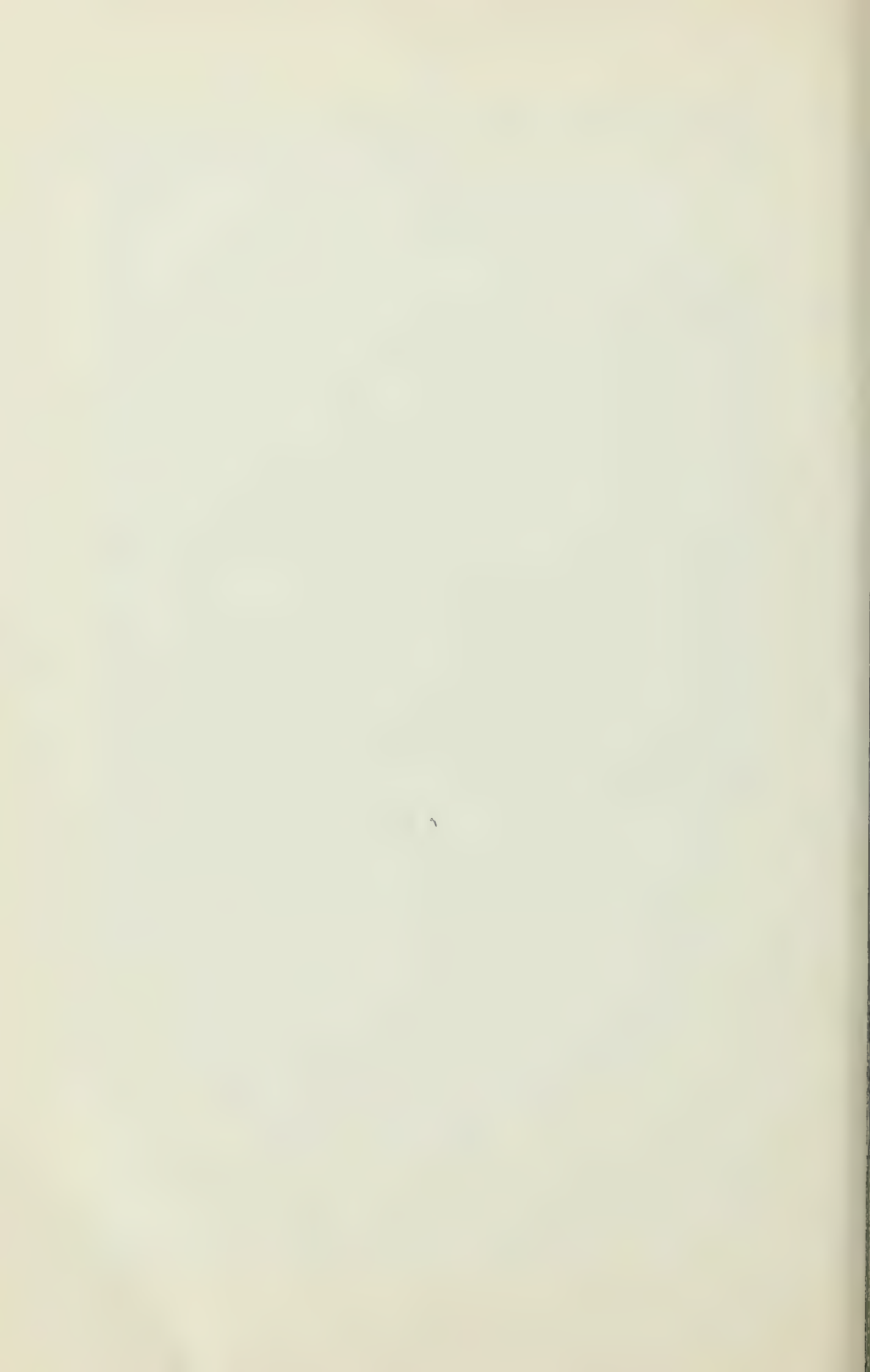
on by the plaintiff in error in any state where the defendant might be found.

It was not the intent or the purpose of the statute, as mistakenly assumed by the district court, to destroy or to impair in any manner a debt obligation, or its transitory character, or any substantive right thereunder, nor to protect the general property of the debtor from payment of the obligation; but the statute, being merely procedural, was framed to avoid multiplicity of action in the courts of California. It was not attempted to trench upon the jurisdiction of any other court, nor to take away from any suitor the right of resort to any court secured to him by the laws of this country or by the Constitution. To yield to the construction given the California statute by the court below, is to hold that if a debt exists or is created between two parties, and security for that indebtedness taken upon lands in California, no court has jurisdiction to enforce such common law obligation except the courts of California. The matter of citizenship does not enter into the determination of the point: the creditor and the debtor may both be residents of Washington and the security be taken upon lands in California, yet, upon the construction invoked, the creditor must first exhaust the security in the courts of California (and may not have jurisdiction of the person of defendant) and if any deficiency results, he must return to the State of Washington and bring his first personal action against the debtor. No such

circuitry of action was ever designed by the legislature of California in seeking to avoid multiplicity of action. The statute does not deny one the right to sue upon the obligation in another state, but its utmost prohibition is to deny the creditor the right of foreclosure in California if judgment be taken upon the debt in another state, and this upon the theory and the construction by the courts of California that such former action waives the mortgage security. The instant action was commenced with full knowledge that, under the construction given to the law of California, the right to foreclose upon the security taken in California would be waived by the recovery of a judgment herein.

We respectfully submit that the judgment of the district court, dismissing the cause upon the ground of want of jurisdiction, was erroneous and should be reversed, with instructions to the lower court to proceed to judgment upon the merits.

CARROLL B. GRAVES,
Attorney for Plaintiff in Error.



In the
United States Circuit Court
of Appeals
For the Ninth Circuit

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT OF THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION

C. A. RIDDLE, THEO. J. ROCHE,
ATTORNEYS FOR DEFENDANT IN ERROR
SUITE 327 COLMAN BLDG., SEATTLE, WASHINGTON

No. 4088

In the
United States Circuit Court
of Appeals
For the Ninth Circuit

J. W. MAXWELL, *Plaintiff in Error,*

VS.

EVA L. RICKS, *Defendant in Error.*

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT OF THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION

BRIEF OF DEFENDANT IN ERROR

MOTION TO DISMISS WRIT OF ERROR
OR AFFIRM JUDGMENT

The defendant in error, by her counsel, respectfully moves the court for a dismissal of the writ of error, or, in the alternative, for an affirmance

of the judgment of the court below, on the grounds and for the reasons following:

1. No exceptions to any of the rulings of the court in the progress of the trial of the cause, upon any fact or upon any proposition of law, were taken or preserved by the plaintiff in error;

2. No bill of exceptions appears in the record, nor was any prepared or presented or filed incorporating therein any ruling of the court, excepted to or otherwise, in the progress of said trial;

3. The record shows no finding made by the court, except a general finding for the defendant;

4. No proper or any objection or exception to the judgment was filed or taken by plaintiff in error at the time of its entry or otherwise.

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ARGUMENT ON THE MOTION

This is an action at law, the trial having been to the court under a written stipulation between the parties waiving a jury. Both sides fully presented their evidence, and at the close of the trial the contentions of the respective counsel were presented and argued to the court, after which the

court took the case under advisement, and about a month thereafter filed an opinion finding for the defendant. (Tr. Record, pp. 26-27.) No exceptions were taken to any ruling of the court, no declarations requested on any proposition of law, and no bill of exceptions appears in the record.

Section 649 of the Revised Statutes provides as follows:

“Sec. 649. (Issues of fact tried by the court.) Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.”

While Section 700 contains the following provisions:

“Sec. 700. (Cases tried by the circuit court without the intervention of a jury.) When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the supreme court upon a writ of error or upon appeal; and when the finding is special the

review may extend to the determination of the sufficiency of the facts found to support the judgment."

Compliance with the provisions of the sections quoted is essential in order to preserve to the party submitting a cause to a trial before a court, both as to law and fact, the benefit of a review or re-examination of questions of law in the appellate court.

The only finding made by the trial court in the instant case is a general finding incorporated in the judgment, and which performs the office of the verdict of a jury. In such case only such rulings of the court, in the progress of the trial, can be reviewed as are presented by bill of exceptions, or as may arise on pleadings.

Plaintiff in error, desiring a review of the law involved in the case, should have requested the trial court to make a special finding, which raises the legal propositions, or he should have presented to the court such propositions of law, and required a ruling on them.

It was held in *Kelly v. Ophir*, 169 Fed. Rep. 598, that an opinion of the trial judge analyzing the facts and applying the law is not a special finding of facts within Section 700.

While no exception of any kind was made to the court's general finding, yet had it been made it would not have operated to bring up to this court any question for review. In the absence of any special finding and of any exception taken to any ruling of the court during the trial, no appeal will lie.

This court is asked to review a question of law, one upon which the trial court did not pass and upon which it was not asked to pass. As this court, in actions of law, can only correct errors committed by the trial court, to which proper exceptions are taken, there is nothing presented in the record for this court's consideration.

The sections of the Revised Statutes referred to have been frequent subjects for consideration, discussion and interpretation by the federal appellate courts, and their meaning and effect are well settled.

Taft, Circuit Judge, speaking for the Circuit Court of Appeals, Sixth Circuit, in *Humphreys v. Third National Bank of Cincinnati*, 75 Fed. Rep. 852, thoroughly covers the grounds above enumerated in support of the motion made by defendant in error, in the following language:

“This practice in the federal courts of appeal differs from that in the state courts of this circuit where it is open to counsel on writ or error by exception to a general finding to raise the question in the appellate court of the sufficiency of the evidence as a matter of law to sustain such finding. We fear that this difference in the practice is not sufficiently well known to counsel, and we think that their attention should be especially directed to the very technical and severe rule of the federal appellate courts in this respect. When a party in the circuit court waives a jury, and agrees to submit his case to the court, it must be done in writing; and if he wishes to raise any question of law upon the merits in the court above he should request special findings of fact by the court, framed like a special verdict of a jury, and then reserve his exceptions to those special findings, if he deems them not to be sustained by any evidence; and if he wishes to except to the conclusions of law drawn by the court from the facts found he should have them separately stated and excepted to. In this way, and in this way only, is it possible for him to review completely the action of the court below upon the merits. A general finding in favor of the party is treated as a general verdict. A general verdict cannot be excepted to on the ground that there was no evidence to sustain it. Such a question must be raised by a request to the court to direct a verdict on the ground of the insufficiency of the evidence. If the views which the court takes of the law are deemed to be prejudicial to a party, he is required to except to the charge at the time

that it is delivered, indicating those parts of it to which he objects. Where a cause is submitted to the court, however, the court cannot, in the nature of things, charge itself, and therefore no opportunity is presented to the party objecting to the views which the court entertains of the law to take his exceptions, unless he procures special findings of fact to be made and special conclusions of law to be drawn therefrom. We regret that in a number of cases brought before us the submission of a law case to a court upon stipulation has proved a trap to counsel in this court, and we say what we have with the hope that it may direct the attention of those who shall bring cases here in the future to the fact that great care must be taken in the preparation of a case for error proceedings, when no jury intervenes."

Judge Wolverton, speaking for this court, in *Societe Nouvelle D'Armement v. Barnaby*, 246 Fed. Rep. 68, held to a like effect, and in the course of the opinion adopted the language of Justice Taft above quoted.

It would seem unnecessary to cite further authorities in support of the motion, but a few are herewith given:

Lloyd v. Williams, 137 U. S. 576; 34 L. Ed. 788.

Norris v. Jackson, 76 U. S. 125; 19 L. Ed. 608.

Press v. Davis, 54 Fed. Rep. 267.

National Bank of Commerce v. First National Bank, 61 Fed. Rep. 809.

City of Key West v. Baer, 66 Fed. Rep. 440.

Distilling, etc., Co. v. Gottschalk Co., 66 Fed. Rep. 609.

Wesson v. Saline Co., 73 Fed. Rep. 91.

Upon the fourth ground stated in the motion, namely, that no sufficient or any exception was taken to the judgment or to its entry, reference is made to the notation at the end of the judgment (Tr. Record, p. 27), which is as follows:

“Exceptions allowed.

EDWARD E. CUSHMAN,
Judge.”

There is nothing to show that plaintiff in error, by his counsel, took or made or filed any exceptions to the judgment, counsels' only act at or before the time of its entry being shown by the other notation:

“Approved:

Carroll B. Graves,
Edwin H. Flick.”

It is submitted that the mere informal and usual allowance of an exception so noted at the end of the judgment by the court does not amount to any substantive act upon the part of counsel making or claiming the same and forms no basis for the review of any error.

In *Kelly v. Ophir, etc., supra*, where the only exception, in the language of counsel, was "to the making and entry" of the judgment, it was held not to be sufficiently specific to present a question of law for determination by the appellate court; and in *Webb v. National Bank, etc.*, 146 Fed. Rep. 717, an exception "to each and all and every of said findings, conclusions and judgment," after a judgment had been rendered at the close of the trial, was futile, in the absence of any objection, exception or request for a declaration of law.

For each and all of the reasons stated, the writ of error should be dismissed, or, in the alternative, that the judgment of the court should be affirmed.

Respectfully submitted,

C. A. RIDDLE,
THEO. J. ROCHE,

Attorneys for Defendants in Error.

STATEMENT OF THE CASE

This is an action at law, the trial having been to the court under a written stipulation between the parties waiving a jury. (Tr. Record p. 26.)

On November 19, 1920, defendant in error executed and delivered to one J. R. Moore her two promissory notes in the sum of \$5,000.00 each, together with a mortgage covering timber lands in the county of Del Norte, state of California, as security for the payment of said notes. This transaction occurred in and was completed by the parties thereto in the state of California. (Tr. Record p. 1.)

Subsequently the said Moore, as payee, endorsed and delivered said notes to plaintiff in error, who instituted action against the defendant in error on the notes alone, alleging in the complaint that the mortgage given to secure the same had no market value, and stating "that the said instrument describing said security will be tendered in court and retransferred to said defendant Eva L. Ricks." (Tr. Record p. 2.)

Defendant in error admitted execution of the notes and mortgage, denied that the security was without value, and alleged its value to be \$20,000, and set up two defenses, namely, first, that the notes were without consideration, based upon allegations of fraud practiced by the payee in inducing the execution and delivery of the same; and, second, the failure of the payee of the notes and mortgage, or of plaintiff in error as assignee thereof, to foreclose on the security, as required by Article X, Chapter I, of the California Code of Civil Procedure. (Tr. Record pp. 9-15.)

A trial covering two days was had on the issues thus presented, and at the close thereof a presentation of the cause was made by counsel for each side in argument, and the cause taken by the court under advisement. (Tr. Record, p. 26.) Thereafter the court rendered a decision, making a general finding for and awarding judgment to the defendant in error. (Tr. Record pp. 21-25.)

No exceptions were taken by plaintiff in error to any ruling of the court in the progress of the trial; no special finding requested or made; no declaration asked or rendered on any proposition of law; and no bill of exceptions appears in the record.

Based upon the absence or lack of such exceptions and upon failure of plaintiff in error to request any rulings of the court, defendant in error has moved the court, and herewith renews such motion, either to dismiss the writ of error or to affirm the judgment, which motion is found earlier in this brief, with citations of authorities in support of such motion; and defendant in error, still insisting upon and not waiving the same, will deal with the other portions of the record as presented by the brief of plaintiff in error.



ARGUMENT

Counsel for plaintiff in error is in error in stating in his first specification of error and assuming in his argument that defendant in error contended, and that the court held, that "the court was without jurisdiction to render judgment," or that the California statute "ousted it of jurisdiction."

The cause was entertained by the court, testimony was offered by both sides, and a full trial was had on all the issues. No special demurrer was interposed, no plea in abatement or other plea to

the jurisdiction was made, and upon consideration of the whole cause, upon a general finding for defendant in error, the court made and entered its judgment.

The provisions of the California statute were alleged in the amended answer (Tr. Record p. 14), were denied by the reply (Tr. Record p. 19), and it must be assumed in the absence of any bill of exceptions that the issue of fact thus raised was proved as any other fact. This is further established by the fact that the legal inference, based upon and deduced from such proof, had a controlling effect in inducing the court's finding.

Counsel for plaintiff in error cites authorities in support of the contention he makes, that the "courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends."

There is no question here of the court's jurisdiction or of the fact that the court did proceed to judgment. Defendant in error, no less than plaintiff in error, was a suitor before the court, and counsel can not complain that the redress afforded was to the defendant in error as such suitor instead of to plaintiff in error.

It is obvious from the form, phraseology, contents, venue and mode of execution of the notes and mortgage that they were prepared by counsel versed in the California law. (Tr. Record pp. 3-8.) They were executed by defendant in error and delivered to plaintiff in error in San Francisco. (Tr. Record p. 1.) Each note bears upon it this language: "This note is secured by a mortgage, of even date herewith," and a copy of each note is incorporated in the mortgage instrument. This is as much a part of the notes as any other part importing a promise to pay, and is sufficient in itself to impart notice thereof to plaintiff in error as endorsee and to put him upon inquiry as to the provisions of the law of the place where said notes and mortgage were executed and delivered.

The law of California, at the time of the execution of the notes and mortgage, provided, and still provides, that there can be but one action for the recovery of any debt, or for the enforcement of any right secured by mortgage, that is by suit in foreclosure, Article X, Chapter I, of the California Code of Civil Procedure, being as follows:

"Section 726.—Proceedings in Foreclosure Suits. There can be but one action for the recovery of any debt, or the enforcement of any right secured by

mortgage upon real or personal property, which action must be in accordance with this chapter. In such action the court may, by its judgment, direct the sale of the incumbered property (or so much thereof as may be necessary), and the application of the proceeds of the sale to the payment of the costs of court, and the expenses of the sale, and the amount due plaintiff, including, where the mortgage provides for the payment of attorney's fees, such sum for such fees as the court shall find reasonable, not exceeding the amount named in the mortgage; and if it appears from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien upon the real estate of such judgment debtor, as in other cases in which execution may be issued."

That suit in foreclosure, where security is given for any debt, is imperative, and that there can be no waiver of the security and no suit maintained on the debt alone, have been many times asserted by the Supreme Court of California.

There can likewise be no waiver even though the security may prove valueless.

Barbieri v. Ramelli, 84 Cal. 154; 23 Pac. 1086.

"The debt is secured by mortgage, and, as only one action may be maintained to enforce a debt thus secured (Sec. 726, Code Civ. Proc.) it follows

that the mortgage security must be exhausted before recourse can be had to the bank account or personal responsibility of the debtor.”

Gnarini v. Swiss American Bank, 162 Cal. 181; 121 Pac. 726.

In *Hibernia Bank v. Thornton*, 109 Cal. 427; 42 Pac. 447, the defendant and his wife gave a mortgage to the plaintiff on their homestead to secure a note. On the death of the wife, plaintiff failed to present his claim against the estate as required by statute, and the mortgaged property was set aside to the surviving husband. Following *Barbieri v. Ramelli*, *supra*, the court held that where a mortgage on its face purports to secure a note, the mortgagee can not release the security and maintain an action on the note.

Construing a statute of California, which provides that several contracts relating to the same matter, between the same parties, and as parts of one transaction, are to be taken together, the supreme court of that state held that a note and a mortgage given to secure the same, delivered at the same time, must be taken and considered together. The mortgage in question, therefore, is inseparably connected with the notes. Their execution and delivery constituted one transaction. Each

in terms referred to the other. They covered the same subject matter and involved the same parties. They must, therefore, be declared upon together in any suit brought for their enforcement.

Meyer v. Webber, 133 Cal. 681; 65 Pac. 1110.

Plaintiff in error, in taking an assignment of the notes, accepted them charged with the same limitations or restrictions which the law of the place of their execution and delivery cast upon them.

In *Ludlow v. Bingham*, 4 Dallas 47; 1 L. Ed. 736, the supreme court expressed the opinion that the law of the place where the contract is made governs with respect to its negotiability.

The mortgage in the instant case contains a provision for attorney's fees (Tr. Record p. 6), and it is the law of California, as held in *Meyer v. Webber*, *supra*, that a note secured by mortgage is not negotiable within the law merchant, or within the civil code, when the mortgage provides for attorney's fees in the event of foreclosure. The decision was upon the construction to be given Sections 3086 and 5093 of the Civil Code: "Being inseparably connected with the mortgage, and affected by the conditions contained therein, the note is not negotiable, within the law merchant or civil code." The notes, then, were taken *cum onere*, and

were subject to the same defenses as they would be in the hands of the original payee.

See, also, *Adams v. Seamon*, 7 L. R. A. (Cal.) 224.

Having thus prefatorially laid the foundation for a statement of the question to be reviewed, if aught may be considered reviewable here, it is conceded that the sole inquiry is, does the statute of California become a part of the contract of the parties, and therefore require foreclosure of the security as therein provided?

It is the contention of the defendant in error that it does, and of the plaintiff in error that it does not.

It is a settled rule of law that contracts are entered into with reference to the laws in force at the place of their execution, that such laws inhere therein, and are imported into and become a part of such contracts, unless it is apparent therefrom or stipulated therein that some other place is to be made the place of performance.

The parties here could have stipulated the place of performance or payment in a state other than California, but they did not do so. In such case it will be taken that the law of the place of execution is also the place of performance.

“The presumption is that contract was intended to be performed at the place where it was made. Law of contract is law at place of its origin in the absence of evidence that it was intended to be performed elsewhere.”

Speed v. May, 17 Pa. St. 91; 55 Am. Dec. 540.

Tillinghast v. Port Royal Lbr. Co., 22 L. R. A. (S. C.) 49.

“It is legal presumption that contract is to be performed where it is made, unless it specifies a different place.

“Parties to agreement are presumed to know law of place where performance is to be made, and to contract with a view to that law unless it is otherwise expressed in the contract, and this presumption is legal and irrebuttable.”

Lewis v. Headley, 36 Ill. 433; 87 Am. Dec. 227.

Allshouse v. Ramsay, 6 Wharton (Pa.) 331; 37 Am. Dec. 417.

“The rule, that the *lex loci contractus* shall govern is derived partly from the presumed consent of the parties, and partly from that law to which both are subject, and to which both for the time being owe obedience. The contract must be governed by such law, and, no other being referred to, it must be the law of the place.”

“Law of place where contract is made and to be performed governs not only as to its execution, authentication, and construction, but also as to the legal obligations arising from it, and as to what is to be deemed a performance, satisfaction, or discharge.”

May v. Breed, 7 Cushing (Mass.) 15.

The Supreme Court of the United States, in Chief Justice Marshall's day, laid down a like rule in *Cox v. the U. S.*, 6 Peters, 172, in the following language:

“The general rule of law is well settled that the law of the place where the contract is made, and not where the action is brought, is to govern in enforcing and expounding the contract; unless the parties have a view to its being executed elsewhere; in which case it is to be governed according to the law of the place where it is to be executed.”

The rule was further stated and confirmed in *Pritchard v. Norton*, 106 U. S. 124; 27 L. Ed. 104, as follows:

“The law we are in search of, which is to decide upon the nature, interpretation and validity of the engagement in question, is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation. It has never been better described than it was incidentally by Ch. J. Marshall in *Wayman v. Southard*, 10 Wheat., 48, where he defined it as

a principle of universal law: 'The principle that in every forum a contract is governed by the law with a view to which it was made.' The same idea had been expressed by Lord Mansfield in *Robinson v. Bland*, 2 Burr., 1077. 'The law of the place,' he said, 'can never be the rule where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed.' And in *Lloyd v. Guibert*, L. R., 1 Q. B., 120, in the Court of Exchequer Chamber, it was said that 'It is necessary to consider by what general law the parties intended that the transaction should be governed, or rather, by what general law it is just to presume that they have submitted themselves in the matter.' *Le Breton v. Miles*, 8 Paige 261.

"It is upon this ground that the presumption rests, that the contract is to be performed at the place where it is made, and to be governed by its laws, there being nothing in its terms, or in the explanatory circumstances of its execution, inconsistent with that intention."

The rule was further stated by the supreme court in the recent case of *Gaston v. Warner*, U. S. Adv. Op. December 1, 1922, p. 16, as follows:

"A contract is to be governed as to its validity and operation, by the law of the place where it was made, in the absence of anything to show that the parties, in making it, had in view any other than such law."

Mr. Justice Holmes, in the case of *Mutual Life Insurance Co. v. Liebing*, another recent case decided in April, 1922, and found in U. S. Adv. Op. under date of July 1st, of that year, in considering a like question, says:

“And although the circumstances may present some temptation to seek a different one (rule) by ingenuity, the constitution and the first principles of legal thinking allow the law of the place where a contract is made to determine the validity and the consequences of the act.”

Where one assumes an obligation at his own domicil, the law of that domicil controls the contract.

Wharton, Conflict of Laws, 2d Ed., Sec. 410.

The principle involved in the rule has been laid down by the courts, and particularly by the Supreme Court of the United States, with so much definiteness as to render a citation of other authorities hardly excusable.

Counsel for plaintiff in error insists, however, that Section 726 of the California Civil Code relates to and furnishes only a method of procedure, and argues that the law of California in the instant case may be evaded by assigning the note to an endorsee in another state and suit in such state

brought thereon, by which method not only the mortgaged property but all other property belonging to the maker of the note may be subjected to its payment; in other words, that the law of the forum enters into and becomes a part of the contract of the parties instead of the law of the place, although at the same time contending that the *lex fori* which he invokes is remedial.

It is the contention of the defendant in error that the right to have the security taken in satisfaction of the notes upon foreclosure, or at least that it first be exhausted before other property should be resorted to, is a substantial right going to the substance of the transaction itself, and belongs to the constitution of the contract. The distinction is well stated in *Scudder vs. Union National Bank*, 91 U. S. 406; 23 L. Ed. 245, as follows:

“Matters bearing upon the execution, the interpretation and the validity of a contract are determined by the laws of the place where the contract is made. Matters connected with its performance are regulated by the laws prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitations, depend upon the law of the place where the suit is brought.”

It is equally well settled that the *lex fori* governs as to the form of action, whether law or equity, as

whether it shall be assumpsit, covenant or debt, the process of the court, the parties to the suit, the sufficiency of the pleadings, the rules of evidence, and matters relating to procedure.

Pritchard v. Norton, supra.

Bulkley v. Honold, 19 Howard 390; 15 L. Ed. 663.

Wilcox v. Hunt, 38 U. S. 378; 10 L. Ed. 209.

Hibernian National Bank v. Lacombe, 84 N. Y. 367.

Tillotson v. Tillotson, 34 Conn. 335.

Brinker v. Scheunemann, 43 Ill. App. 659.

“The principle is, that whatever relates merely to the remedy and constitutes part of the procedure, is determined by the law of the forum, for matters of process must be uniform in the courts of the same country; but whatever goes to the substance of the obligation and affects the rights of the parties, as growing out of the contract itself or inhering in it or attached to it, is governed by the law of the contract.”

Pritchard v. Norton, supra.

In case of contract, like that at bar, in which the jurisdiction of the court depends upon the citizenship of the parties, and in which a foreign state supplies the applicatory law, the court is bound to adopt and give effect to such foreign law which, by

act and will of the parties, has become part of their agreement, and which, without such adoption, would have no force outside its own territory.

If counsel for plaintiff in error is right in his assertion that the right to sue on the notes alone in a jurisdiction other than that of their origin is absolute as a common law right, and in the statement that "any other view of the matter would prevent citizens of other states from resorting to the federal courts for the enforcement of their claims and limit them to the special mode of relief prescribed by a state," then, following his argument to a conclusion, the *lex loci contractus* never inheres in a contract involving the execution and delivery of promissory notes, and no defense thereto that does not grow out of the law of the forum where suit happens to be brought, can be considered meritorious. And this, despite the fact that the courts with practically unanimity hold that the negotiability or non-negotiability of bills and notes, payment that operates as a full or conditional discharge, the validity or invalidity of a foreign assignment, tender and refusal of payment—all go to the merits, inhere in the instruments, are entertained as meritorious defenses, and must be decided by the *lex loci contractus*. So, if by the law of the

place of a contract, equitable defenses are allowed in favor of the maker of a negotiable instrument, such law becomes a part of the instrument and any subsequent endorsement will not operate to change his rights in regard to the holder. The latter must take it *cum onere*.

Story, Confl. L., Sec. 332.

Evans v. Gray, 12 Mart. (La.) 475.

Plaintiff in error in his brief states that if the law of California pleaded in defense is held to apply, then "The matter of citizenship does not enter into the determination of the point: the creditor and the debtor may both be residents of Washington and the security be taken upon lands in California, yet, upon the construction invoked, the creditor must first exhaust the security in the courts of California," etc.

Replying to this, it may be said that no such construction is invoked, but a directly contrary construction instead. If the creditor and the debtor are both residents of Washington then the law of that state, being the place of execution and of the residence of the parties contracting, governs in any action to enforce recovery. The suit may then be directly upon the note in that state.

It is further stated in the brief that it is not the purpose of the statute to prevent other than the mortgaged property from being levied on in case of deficiency, to which statement defendant in error agrees. But the claim that because a deficiency, in case deficiency exists, may be enforced in either event of suit of foreclosure in California or upon a judgment on the notes alone in Washington, is quite beside the question. Defendant in error has a *right*, founded on the statute, which is the *lex loci*, to claim exemption from execution upon all of her property other than the mortgaged property until the latter is exhausted. As was said in *Barbieri v. Ramelli*, *supra*, in construing the effect of Section 726, "it follows that the mortgaged security must be exhausted before recourse can be had to the bank account or personal responsibility of the debtor."

To the same effect is *Meyer v. Webber*, *supra*, where the court said, "whatever the form of the debt, the mortgagor can be legally compelled to pay no part of it until the decree is entered for the sale of the premises mortgaged, and the liability which shall then accrue to him is liability to pay only a deficiency which shall appear on the sheriff's return. The liability is therefore contingent and dependent upon the fact whether upon the sale of the mortgaged premises there shall be a deficiency.

The rule that contracts are to be governed by the law in force at the place of their execution has its exceptions, which may be stated as follows: Contracts that contravene public policy of the forum state, or that are immoral or *malum in se*, or against religion or public rights, or that are intended to promote or reward the commission of crime, to corrupt or evade the due administration of justice, and other contracts which in their nature are founded in moral turpitude. In such cases a discussion about the *lex loci* is nugatory.

Story, Conf. L., Secs. 38, 244.

Oscanyan v. Winchester, etc., 103 U. S. 261;
26 L. Ed. 539.

The Kensington, 183 U. S. 263; 46 L. Ed.
190.

Smith v. Godfrey, 61 Am. Dec. (N. H.) 617.

Carstens Packing Co. v. S. Pac. Co., 58 Wash.
239.

Plaintiff in error, in support of his contention that the statute of California has only a local procedural relation to foreclosure actions, relies chiefly upon certain cases cited at page seven of his brief, from which he quotes liberally in subsequent pages.

They will be here dealt with and enumerated separately:

1. *Ould v. Stoddard*, 52 Cal. 613:

The Supreme Court of California had before it the question of whether, after the holder of a note secured by a mortgage on California lands had secured judgment in Ohio in a suit on the note alone, which judgment remained unsatisfied, he could come into California and institute another and a separate suit for the foreclosure of the mortgage. It was held that by prosecuting his action upon the note alone he had exhausted his remedy upon both the note and security. The report of the case is silent as to where or in what state the parties either resided or contracted. Since the judgment was a personal judgment against the maker it is fair to presume that both the maker and holder were residents of Ohio, which state may have been the place of execution of the note and mortgage. If so, there could be no question of the holder's right to sue upon the note alone in that state and then waive his security. The report of the case also fails to disclose the defense of the California statute or any defense, and the judgment may have been taken on default of the maker. The question raised here was not passed upon.

2. *Blumberg v. Birch*, 99 Cal. 416:

Here a note was executed and delivered in California and secured by a mortgage on California lands. Foreclosure was had by publication and the holder was permitted to prosecute his remedy for the enforcement of a delinquency resulting from the sale of the security.

3. *Felton v. West*, 102 Cal. 266:

The security was lands in Oregon. The holder of the note and mortgage foreclosed in that state by publication and bid in the property for a part of the judgment. He subsequently brought a personal action in California against the maker of the note for the balance due on the judgment. This he was permitted to do, but the court said, "In bringing his action he was not free to choose between Oregon and California. He had no standing whatever in the courts of California. He was compelled to go to Oregon to bring his action." It is claimed that the statute is held to apply only to actions to recover a debt secured by mortgage upon lands in California.

4. *London, etc., Bank v. Dexter Horton Co.*, 126 Fed. 593 (9th C. C. A.):

The lands covered by the mortgage given to secure the debt were in the state of Washington.

This court held that the law of California (Sec. 726) has no application to a suit to foreclose the mortgage in another state where the property is situated.

5. *Mantle v. Dabney*, 47 Wash. 394:

The note was made in the state of Montana. The security was on lands in California. The action was upon the note in Washington. The Washington supreme court held that a similar statute of Montana to that of California would not operate as a defense to an action upon the note in a Washington court. Neither the law of the place of execution nor the law of the forum in which suit was brought had jurisdiction over the *situs* of the mortgaged property.

None of the foregoing cases involves the issues here and they fall short of establishing the point in support of which they are cited as authorities.

It is submitted that the judgment of the trial court is right and should be affirmed.

Respectfully submitted,

C. A. RIDDLE,
THEO. J. ROCHE,

Attorneys for Defendant in Error.



No. 4088

United States
Circuit Court of Appeals
For The Ninth Circuit

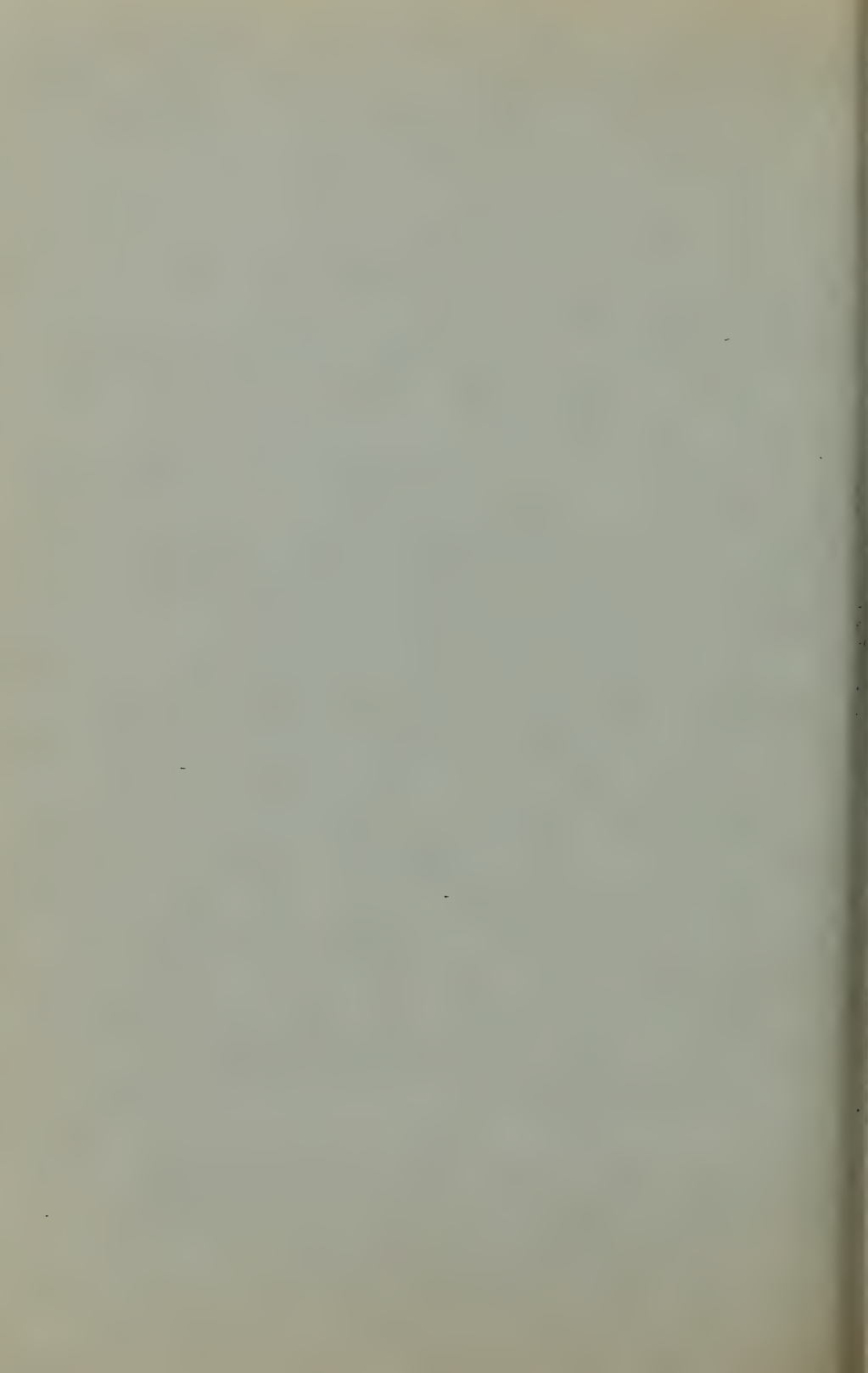
J. W. MAXWELL,
Plaintiff in Error,
VS.
EVA L. RICKS,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT
COURT OF THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

REPLY BRIEF OF PLAINTIFF IN ERROR

CARROLL B. GRAVES,
Attorney for Plaintiff in Error.
Central Building, Seattle, Washington.

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REPLY BRIEF OF PLAINTIFF IN ERROR

ARGUMENT ON MOTION TO DISMISS WRIT
OF ERROR.

It is indispensable to a review of the admission or rejection of evidence, or objections to a charge given or refused, or objections made to the proceedings had in the course of a trial at law, that exceptions to the rulings of the trial court be taken at the time and preserved for review by a bill of exceptions.

It is equally well settled that no exception, or bill of exceptions, is necessary to review a question of law already apparent on the record.

The memorandum decision shows that the only

question considered by the court was the construction of the California statute. The construction given that statute was to the effect that foreclosure must first be had before any action could be maintained on the secured obligation. The court declined to consider any other question involved, and ordered judgment for defendant. Record, 25.

The proceedings taken and the action had by the court are all recited in the judgment entry itself. Unnecessarily, exceptions were allowed by the trial judge to the ruling made and stated in the judgment entry. Record, 26.

The trial court declined to consider any matter or question concerning which evidence may have been taken. The existence of the California statute was not questioned, and it was expressly admitted that a mortgage was given to secure the notes, and that no suit had ever been brought in California, or elsewhere, to foreclose the mortgage.

The only error sought to be reviewed appears therefore on the record without need for bill of exceptions, or other exception. The bringing here of any evidence in a bill of exceptions, or exceptions based upon any ruling touching the evidence, is not only unnecessary but quite improper as well. The judgment denying the right of plaintiff in error to maintain the instant action is not challenged nor is it challengeable by any fact, proceeding, or ruling, save as recited in the judgment entry.

“The record contains no bill of exceptions, and does not show any exception to the action

of the court in granting plaintiff's motion to withdraw a juror, or in allowing the case to be dismissed as it was. It is objected that, for lack of such exception, the error assigned cannot be considered. We think the case did not require any bill of exceptions. The entire action of the court is recited upon the face of the judgment entry, so that it fully appears upon the record, and no exception is required to raise the question whether the record in the case supports the challenged judgment."

Worthington v. McGough, 192 Fed. 512 (C. A. 6);

Chicago, R. I. & P. Ry. Co. v. Barrett, 190 Fed. 118, 123 (C. C. A. 6);

Willis v. Davis, 184 Fed. 889 (C. C. A.).

No exception, or bill of exceptions, is necessary to open a question of law already apparent on the record.

Denver v. Home Savings Bank, 236 U. S. 101, 104;

Nalle v. Oyster, et al., 230 U. S. 165, 176.

Also see the following:

Welsh v. United States, 267 Fed. 819 (C. A. 2);

Rocky Mountain Fuel Co. v. Consolidated Coal &c. Co., 276 Fed. 661, 666 (C. C. A. 8).

In refusing to consider any other point in the case, and in dismissing the action upon the construction given to the California statute, the court

below necessarily proceeded upon the ground that, independently of every question, the plaintiff in error could only recover after exhausting his remedy by foreclosure of the mortgaged lands. If this ruling or judgment is error, it is one apparent on the record and need not have been presented by bill of exceptions.

Moline Plow Co. v. Webb & Bros., 141 U. S. 616, 623.

The contention made by counsel for defendant in error is based upon a misapprehension. They are largely led into an erroneous conception of the practice by the misconstruction which they placed upon the effect of the ruling in *Humphreys v. Third National Bank of Cincinnati*, 75 Fed. 852. The court was there dealing with special findings of fact to be made upon the evidence, and special conclusions of law to be drawn therefrom. The true situation is disclosed by the following quotation from the opinion:

“When a party in the circuit court waives a jury, and agrees to submit his case to the court, it must be done in writing; and if he wishes to raise any question of law upon the merits in the court above he should request special findings of fact by the court, framed like a special verdict of a jury, and then reserve his exceptions to those special findings, if he deems them not to be sustained by any evidence; and if he wishes to except to the conclusions of law drawn by the court from the

facts found, he should have them separately stated and excepted to. In this way, and in this way only, it is possible for him to review completely the action of the court below upon the merits."

The position which counsel is contending for is very clearly and tersely summarized by Justice Miller in *Norris v. Jackson*, 76 U. S. 125. It is, in legal effect, a resume of the views stated by Judge Taft in the *Humphreys* case *supra*. Justice Miller's condensation of the matter, when construed in connection with the rule given in the cases from the same jurisdiction, cited above, furnish the true rule relating to when an exception, or bill of exceptions, may be necessary.

The action was dismissed for the reason and upon the record fact in the judgment itself. We believe the ruling to be erroneous, and that claimed error is now apparent upon the record, and the sole question which this court is called upon to examine, is the correctness of the ruling recited in and carried into the judgment.

The United States Courts will take judicial notice of the public laws and jurisprudence of all the states. 15 R. C. L. p. 1076. This in answer to an observation found at page 13, first paragraph, of opposing brief.

Respectfully submitted,

CARROLL B. GRAVES,
Attorney for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE FRANZ CORPORATION, a Corporation,
Plaintiff in Error,
vs.
E. J. FIFER,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Montana.

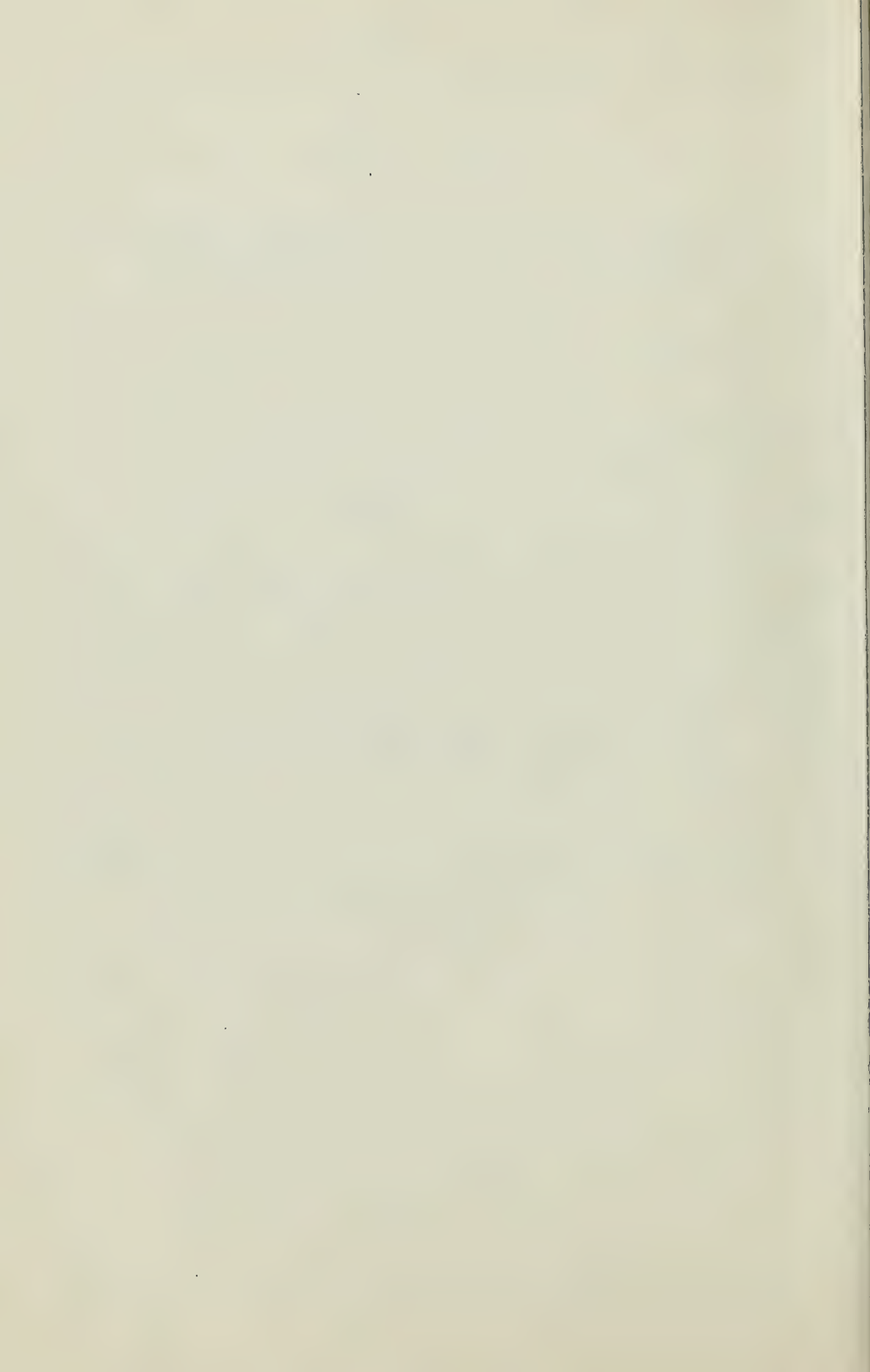


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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

Messrs. FORD & CHOATE, of
Helena, Montana,
Attorneys for Plaintiff and Defendant in
Error.

Messrs. STEWART & BROWN, of
Helena, Montana, and
CHAS. J. MARSHALL, Esq., of
Lewistown, Montana,
Attorneys for Defendant and Plaintiff in
Error. [1*]

In the District Court of the United States in and
for the District of Montana.

No. 1031.

E. J. FIFER,

Plaintiff,

vs.

THE FRANZ CORPORATION,

Defendant.

BE IT REMEMBERED, that on June 13, 1922,
the plaintiff's complaint was filed herein, being in
the words and figures following, to wit: [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the United States District Court, District of
Montana.

E. J. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION,

Defendant.

Complaint.

Comes now the above-named plaintiff and for cause of action against the above-named defendant, complains and alleges:

1.

That plaintiff is now and was at all the times herein mentioned, a citizen and resident of the State of Montana.

2.

That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Wyoming, with it's principal place of business in the city of Casper in the State of Wyoming, and that it is and was at all the times herein mentioned, a citizen and resident of the State of Wyoming.

3.

That the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars, and is between citizens of different states.

4.

That at all the times herein mentioned, the plaintiff was and now is the owner in fee simple, of

the following-entitled real estate, situate in the State of Montana, to wit:

E. $\frac{1}{2}$ NE. $\frac{1}{4}$ Section 20, Tp. 15 North, Range 30 East, M. P. M. and N. $\frac{1}{2}$ NW. $\frac{1}{4}$ Section 21, Tp. 15 North, Range 30 East, M. P. M.

5.

That said land is, and at all the times herein mentioned, was agricultural land, embracing about 50 acres of first-class irrigated land, capable of producing large crops of hay and [3] grain, and 30 acres of dry land under cultivation and capable of producing the crops commonly raised in the State of Montana upon lands of that character and 80 acres of first-class grazing lands.

6.

That on the 26th day of September, 1919, the plaintiff and one Frank Frantz, entered into a certain oil and gas lease, under the terms of which, the said plaintiff granted, demised, leased and let, unto the said Frank Frantz, for the sole and only purpose of mining and operating for oil and gas, the laying of pipe-lines and building of tanks, power stations, and structures thereon, to produce, save and take said products, the lands hereinabove described, a copy of which said oil and gas lease is hereto attached, marked Exhibit "A," and by this reference made a part hereof.

7.

That after the execution of said lease and prior to January 15th, 1920, the said Frank Frantz did sell and assign the said lease to the said defendant, The Frantz Corporation. That under the terms of said

lease, the said lessee, Frank Frantz, agreed to pay to the lessor, the plaintiff herein, the amount of any damages caused to growing crops or fences and any other damages caused to said premises by the said lessee or said lessee's agents, to which said obligation the defendant herein succeeded by virtue of the assignment aforesaid.

8.

That during the month of January, 1920, the said defendant, acting under and by virtue of the provisions of said lease herein set forth as Exhibit "A," entered upon said lands and premises for the purpose of mining and prospecting for oil and gas on said premises. That in carrying on said operations, defendant opened and tore down part of the fences of plaintiff enclosing said lands, established roads over upon and across said lands, built pipelines thereon, constructed telephone lines, built tanks, power and pumping stations for the purpose of caring for and handling the production of oil produced upon lands other than [4] those of plaintiff, and built a water pumping station upon said lands to supply water for its own operations in the Cat Creek Field, as well as to other persons operating for oil and gas in said field.

9.

That for many years prior to said entry by defendant, plaintiff had been engaged and was so engaged at the time of said entry by defendant, in a successful and profitable general farming and stock raising business upon said premises. That said premises prior to the entry of defendant as afore-

said, were completely fenced with a good and substantial four wire fence properly constructed with posts set twenty feet apart, together with cross fences, lanes and corrals.

10.

That in addition to the operations upon plaintiff's lands as aforesaid for the purpose of prospecting and mining for oil and gas, the defendant at all the times herein mentioned, conducted extensive oil and gas operations on lands adjoining and in the vicinity of the lands of the plaintiff and said operations, so conducted upon plaintiff's said lands, were incident to and a part of defendant's general operations as aforesaid, and for the purpose of conducting said general operations, defendant made use of the right of entry upon plaintiff's lands under the terms of said lease.

11.

That by reason of the entry, conduct and actions of the defendant as aforesaid, and especially by reason of the breaking down of said fences and the opening up of roads as aforesaid, through said premises, the protection of said premises against the inroads of cattle and range stock was wholly destroyed, with the result that cattle and range stock were permitted to and did enter upon said premises and ate up and destroyed the grasses, growing crops and vegetables growing upon said premises and plaintiff was thereby wholly deprived of the use of said lands for general farming and stock-raising purposes and plaintiff [5] was forced and compelled thereby to abandon, and at all times since the spring

of 1920, plaintiff has abandoned the use of said premises for general farming, agricultural and stock-raising purposes, save and except that in the year 1920, plaintiff cut a partial crop of hay consisting of about 45 tons off of a portion of said lands.

12.

That but for the entry and conduct of the defendant as aforesaid, said premises were capable of producing and would have produced large quantities of hay, grain, corn, grasses and vegetables, and have afforded pasturage for plaintiff's stock-raising operations, all of which would have been of the reasonable value of not less than \$2500.00 per annum. That the damage to plaintiff's fences by reason of the entry aforesaid was and is the sum of \$1200.00. That the damage to plaintiff's said lands, by reason of the entry of the defendant as aforesaid in the construction of pipe-lines, telephone lines, tanks and power stations, and other structures thereon, the building and establishing of roads over and upon said lands as aforesaid, was and is of the reasonable value of \$4,000.00. That the damage resulting from the entry and operations aforesaid to plaintiff's established and successful farming and stock-raising business upon said premises, was and is the sum of \$2,500.00. That by virtue of the facts and circumstances hereinbefore set forth, and as a result of the acts of the defendant as aforesaid, plaintiff has been damaged in the sum of Ten Thousand Dollars (\$10,000.00) no part of which has been paid.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of (\$10,000.00) Ten Thousand Dollars, with interest thereon at the legal rate together with plaintiff's costs and disbursements herein.

FORD & CHOATE,
Attorneys for Plaintiffs. [6]

State of Montana,
County of Lewis and Clark,—ss.

S. C. Ford, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled action and makes this verification for and on behalf of said plaintiff; That the reason why affiant makes said verification is that plaintiff is not now within the county of Lewis and Clark, state of Montana, in which said county affiant resides. That affiant has read the within and foregoing complaint and knows the contents thereof and that the matters stated therein are true to the best knowledge, information and belief of affiant.

S. C. FORD.

Subscribed and sworn to before me this 12th day of June, A. D. 1922.

[Seal] I. W. CHOATE,
Notary Public for the State of Montana, Residing
at Helena, Mont.

My commission expires February 9, 1925. [7]

Exhibit "A."**OIL AND GAS LEASE.**

THIS AGREEMENT, Made and entered into the 26th day of September, 1919, by and between ELLIS J. FIFER, of Mosby, Montana, party of the first part, hereinafter called lessor (whether one or more), and FRANK FRANTZ, of Casper, Wyo., party of the second part, lessee.

WITNESSETH; That, at the time of the ensealment and delivery of this contract the lessor declares and represents that said lessor is in the legal possession, and has good and lawful right to lease the hereinafter described *described* premises.

That the said lessor, for and in consideration of \$1.00 Dollars, receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained, on the part of the lessee to be paid, kept and performed, has granted, demised, leased and let, and by these presents does grant, demise, lease and let unto the said lessee, for the sole and only purpose of mining and operating for oil and gas, the laying of pipe lines, and building tanks, power, stations and structures, thereon, to produce, save and take care of said products, all that certain tract of land situate in the County of Fergus, State of Montana, described as follows, to wit:

E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Section 20, T. 15 N. R. 30
E. of M. M., N. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Section 21, T. 15
N. R. 30 E. of M. M., and containing 160 acres,
more or less.

The term of this lease shall be three (3) years from the date of this instrument, and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee.

In consideration of the premises, the said lessee covenants and agrees:

1st. To deliver to the credit of the lessor, free of cost, in the pipe line to which said party may connect the wells, the equal one-eighth ($1/8$) part of all oil and gas produced and saved from said premises, or to pay to said lessor one-eighth part of the proceeds received from the sale of said oil or gas, either of them the option of the lessor, said option to be exercised not more than once in six months.

2nd. To keep accurate production records and books of account showing the amount of production, and the disposition thereof, derived from said premises, which books shall be open at all reasonable times during the business hours to the inspection of the lessor, so far as the same may apply to the production and disposition of production.

If no well be commenced on said land on or before [8] the 26th day of March, 1920, this lease shall terminate as to both parties, unless the lessee, on or before that date, shall pay or tender to the lessor, or to the lessor's credit—successors, which shall continue as the depository for the payment of rentals and royalties and all other purposes herein mentioned, regardless of the changes in the ownership of said land, the sum of \$160.00 Dollars, which shall operate as a rental and cover the privilege of deferring the commencement of a well for

twelve (12) months from said date. In like manner, and upon like payments or tenders the commencement of a well may be further deferred for like periods of the same number of months successively. And it is understood and agreed that the consideration first recited herein, the down payment, covers not only the privileges granted to the date when said first rental is payable, as aforesaid, but also the lessee's option of extending that period, as aforesaid, and any and all other rights conferred.

Should the first well drilled on the above-described land be a dry hole, then, and in that event, if a second well is not commenced on said land within twelve months from the expiration of the last rental period for which rental has been paid, this lease shall terminate as to both parties, unless the lessee on or before the expiration of said twelve months shall resume the payment of rentals in the same amount and in the same manner as hereinbefore provided. And it is agreed that upon the resumption of the payment of rentals, as above provided, that the last preceding paragraph hereof, governing the payment of rentals and the effect thereof, shall continue in force just as though there had been no interruption in the rental payments.

Lessee shall have the right to use, free of cost, gas, oil and water produced on said land for its operations thereon.

Lessee shall have the right at any time to remove all machinery and fixtures placed on said premises, including the right to draw and remove casing.

It is understood and agreed that all taxes and assessments levied against said land, or the produc-

tion therefrom, shall be paid by the respective parties in the proportion of the interest of each, in the production from said land, that is, one eighth ($1/8$) by the lessor and seven-eighths ($7/8$) by the lessee.

Lessee shall have the right to surrender any or all of the above-described premises, upon the payment to the lessor of One (\$1.00) Dollar and filing in the office of the County Clerk and Recorder of the county in which said premises are situate a written instrument of surrender of said premises, and shall thereafter be excused from doing any assessment or other work, or the payment of rentals, upon said premises so surrendered, provided that such instrument of surrender shall be filed before the first day of November, of the year in which said surrender is made. [9]

If the estate of either party hereto is assigned, and the privileges of assigning in whole or in part is expressly allowed, the covenants hereof shall extend to their heirs, executors, administrators, successors or assigns, but no change in the ownership of the land or assignment of rentals or royalties shall be binding on the lessee until after the lessee has been furnished with a written transfer or assignment or a true copy thereof, and it is hereby agreed that in the event this lease shall be assigned as to a part or as to parts of the above-described lands and the assignee or assignees of such part or parts shall fail or make default in the payment of the proportionate part of the rents due from him or them, such default shall not operate to defeat or affect this lease in so far as it covers a part or parts of said lands

upon which the said lessee or any assignee thereof shall make due payment of said rental.

Lessee further agrees to pay to the lessor any damages caused to growing crops, fences, or other damages upon said premises, by the lessee or the lessee's agent.

IN WITNESS WHEREOF, the parties have signed this instrument this 26th day of September, 1919.

ELLIS J. FIFER,
Lessor.
FRANK FRANTZ,
Lessee.

Witnesses:

J. W. CLAYTON.
ALFRED R. LOWEY.

State of Montana,
County of Garfield,—ss.

On this 26th day of September, 1919, before me personally appeared Ellis J. Fifer, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

IN WITNESS WHEREOF, I have hereunto affixed my notarial seal this 26th day of September, 1919.

[Seal]

GEORGE G. GATES,
U. S. Commissioner.

My commission expires Sept. 19, 1921.

State of Wyoming,
County of Natrona,—ss.

On this 3d day of October, 1919, before me personally appeared Frank Frantz, to me known to be the persons described in and who executed the same as their free act and deed.

IN WITNESS WHEREOF, I have hereunto affixed my notarial seal this 3d day October, 1919.

[Seal]

ALFRED R. LOWEY,
Notary Public.

My commission expires Jan. 24, 1922.

Filed June 13, 1922. C. R. Garlow, Clerk. By
H. H. Walker, Deputy Clerk. [10]

Thereafter, on June 13, 1922, summons was duly issued herein, in the words and figures following, to wit: [11]

UNITED STATES OF AMERICA.

District Court of the United States, District of
Montana.

Action brought in the said District Court, and the
Complaint filed in the office of the Clerk of
said District Court, in the City of Helena,
County of Lewis & Clark. Assigned to Great
Falls Division.

E. J. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION,

Defendant.

Summons.

The President of the United States of America,
to the above-named defendant, The Frantz
Corporation; GREETING:

You are hereby summoned to answer the complaint in this action which is filed in the office of the Clerk of this court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Witness, the Honorable GEO. M. BOURQUIN,
Judge of the United States District Court, District
of Montana, this 13th day of June, in the year of
our Lord one thousand nine hundred and twenty-
two, and of our Independence the 146.

[Seal]

C. R. GARLOW,
Clerk.

By H. H. Walker,
Deputy Clerk.

[Endorsed]: No. 1031. U. S. District Court,
District of Montana. E. J. Fifer vs. The Frantz
Corporation. Summons. Ford & Choate, Plain-
tiff's Attorneys, Helena, Montana. Filed July
5th, 1922. C. R. Garlow, Clerk. By Conrad G.
Kegel, Deputy Clerk. [12]

Service of the within summons together with copy of complaint acknowledged and accepted and copy had this 3d day of July, A. D. 1922.

THE FRANTZ CORPORATION.

By Chas. J. Marshall,
Attorney in Fact. [13]

Thereafter, on Oct. 26, 1922, answer of defendant was duly filed herein in the words and figures following, to wit:

In the United States District Court, District of
Montana.

E. J. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION,

Defendant.

Answer.

Comes now the above-named defendant, by its attorney Chas. J. Marshall, and in answer to the complaint of plaintiff on file herein admits, denies and alleges as follows:

1.

Admits the allegations, matters and things pleaded in paragraphs one, two, three, four, six, seven and ten of said complaint.

2.

Denies generally and specifically each and every allegation, matter and thing pleaded on paragraphs

five, nine, eleven and twelve of said complaint, except defendant admits that it has not paid to plaintiff the sum of Ten Thousand Dollars, or any other sum.

3.

In answer to paragraphs eight of said complaint defendant admits that during the month of January, 1920, the said defendant, acting under and by virtue of the provisions of said lease set forth as Exhibit "A" in said complaint, entered upon a part of said lands and premises described in said complaint, for the purpose of mining and prospecting for oil and gas on said premises. Defendant admits that in carrying on said operations defendant opened some of the fences of plaintiff inclosing said lands, for the purpose of entering thereon, and establish certain roads over, [14] upon and across said lands, built pipe-lines thereon, constructed telephone lines, built tanks, power and pumping stations for the purpose of caring for and handling the production of oil produced upon the lands of plaintiff, and other lands, and built a water pumping station upon said lands to supply water for its operations in the Cat Creek field, all of which acts were done by defendant to carry out the terms of said oil and gas lease, a copy of which is attached to the complaint of plaintiff on file herein marked Exhibit "A," and by such reference made a part thereof. Denies that defendant done any acts other than such acts as were necessary to carry out the terms, conditions and stipulations of said oil and gas lease, and such

acts as were contemplated by the terms, conditions and stipulations of said oil and gas lease. Defendant alleges that all of said acts were done and performed for the mutual benefit of the plaintiff and defendant, and with the knowledge and consent of the plaintiff. Denies that defendant tore down any fences, or done any other acts to the damage of plaintiff, or other than as provided for by the terms of said oil and gas lease, and as contemplated under the terms, conditions and stipulations of said oil and gas lease.

4.

Denies that plaintiff has been damaged in the sum of Ten Thousand Dollars, or any other sum, or at all, through the acts of defendant, or through the acts of any agent or employee of the defendant for whom the defendant can be held responsible.

5.

Denies generally and specifically each and every allegation, matter and thing in said complaint pleaded, not hereinbefore specifically admitted, qualified or denied.

6.

Further answering the complaint of plaintiff on file herein, and for affirmative relief defendant alleges: [15]

1.

That there is another action pending in the District Court of the Tenth Judicial District of the State of Montana, in and for the county of Fergus, between the same parties, for the same cause, and for the same relief.

WHEREFORE, defendant having answered the complaint of plaintiff on file herein demands judgment against said plaintiff as follows:

I.

That the complaint of plaintiff on file herein be dismissed.

II.

That plaintiff be denied the damages prayed for in his complaint on file herein, or any damages.

III.

That the defendant be allowed its costs and disbursements herein expended and incurred.

CHAS. J. MARSHALL,

Attorney for Defendant.

State of Montana,
County of Fergus,—ss.

Chas. J. Marshall, being first duly sworn on oath, deposes and says:

That he is the attorney for the defendant in the above-entitled action, and makes this verification for and on behalf of said defendant; that the reason affiant makes said verification is that the defendant The Frantz Corporation is a corporation, and that there are no officers of the defendant The Frantz Corporation within the county of Fergus, State of Montana, in which said county affiant resides; that affiant has read the within and foregoing answer of the defendant The Frantz Corporation, and knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

CHAS. J. MARSHALL.

Subscribed and sworn to before me this 24th day of Oct., A. D. 1922. [16]

[Seal] R. S. HARRINGTON,
Notary Public for the State of Montana, Residing
at Lewistown.

My commission expires October 2d, 1923.

Filed Oct. 26, 1922. C. R. Garlow, Clerk. [17]

Thereafter, on June 12, 1923, reply to answer was filed herein, in the words and figures following, to wit:

In the United States District Court in and for the
District of Montana.

E. J. FIFER

vs.

THE FRANTZ CORPORATION.

Reply.

Now comes the plaintiff, and upon application to and by leave of Court first obtained, files this his reply to the answer of the defendant as follows:

1.

Replying to that portion of said answer denominated "For Affirmative Relief," plaintiff denies that there is another action pending in the District Court of the Tenth Judicial District of the State of Montana, in and for the county of Fergus between the same parties for the same cause, and for the same relief and further denies that any action is pending between said parties in any other

court upon the same cause or for the same relief as is asked for herein.

WHEREFORE, plaintiff prays as in his complaint herein.

FORD & CHOATE,
Attorneys for Plaintiff.

Service of foregoing reply admitted and copy received.

CHAS. J. MARSHALL,
Attorney for Defendant. [18]

State of Montana,
County of Lewis and Clark,—ss.

I. W. Choate, being first duly sworn on oath deposes and says: That he is a member of the firm of Ford and Choate, and is one of the attorneys for the plaintiff in the above-entitled action.

That affiant makes this verification for and on behalf of said plaintiff, for the reason that said plaintiff resides in the county of Fergus, State of Montana and is now absent from the county of Lewis and Clark, State of Montana, in which said county, to wit, in the city of Helena, Montana, affiant resides.

That affiant has read the within and foregoing reply and knows the contents thereof and that the matters and things therein stated are true to the best knowledge, information and belief of affiant.

I. W. CHOATE.

Subscribed and sworn to before me this 4th day of June, A. D. 1923.

[Seal]

H. G. PICKETT,
Notary Public for the State of Montana, Residing
in Helena, Montana.

My commission expires February 26th, 1924.

Filed June 12, 1923. C. R. Garlow, Clerk. By
Conrad G. Kegel, Deputy Clerk. [19]

In the United States District Court, District of
Montana.

E. J. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION,

Defendant.

Verdict.

We, the jury in the above-entitled cause hereby find the issues in favor of the plaintiff and against the defendant and assess plaintiff's damages at the sum of Thirty-five Hundred (\$3500.00).

FRANK A. RICHARDS,

Foreman.

Filed June 19, 1923. C. R. Garlow, Clerk. By
H. H. Walker, Deputy Clerk. [20]

Thereafter, on June 23, 1923, judgment was duly entered herein in the words and figures following, to wit:

In the United States District Court, District of
Montana.

#1031.

E. J. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION,

Defendant.

Judgment.

The above-entitled action came on regularly for trial on June 18th, 1923. The plaintiff appeared in person and by his attorneys, Ford and Choate, of Helena, Montana, and the defendant appeared by its attorneys Messrs. Stewart and Brown of Helena, Montana, and Mr. Charles J. Marshall of Lewistown, Montana. A jury of twelve persons was regularly impaneled and sworn to try said action.

Witnesses on the part of the plaintiff and the defendant were sworn and testified on direct and cross-examination. After hearing the evidence the argument of counsel and the instructions of the Court, the jury retired to consider their verdict, and thereupon returned into court a written verdict signed by the foreman of said jury finding the issues in said action in favor of the plaintiff

and against the defendant and assessing the plaintiff's damages at the sum of \$3500.00.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged, that said plaintiff have and recover from said defendant the sum of Thirty-five Hundred Dollars (\$3500.00), with interest thereon at the rate of 8% per annum from the date hereof until paid, together with the said plaintiff's costs and disbursements incurred in said action amounting to the sum of \$185.70.

Judgment rendered June 23d, 1923.

C. R. GARLOW.

By Conrad G. Kegel,
Deputy. [21]

Thereafter, on July 30, 1923, petition for a new trial was duly filed herein, being in the words and figures following, to wit: [22]

In the District Court of the United States for the
District of Montana.

Case No. 1031.

E. F. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION, a Corporation,
Defendant.

Petition for New Trial.

Comes now the above-named defendant and within the time allowed by the rules of this Court,

the order of the Court and stipulation of the parties herein, files this its petition for a new trial and respectfully petitions the above-entitled court, and Honorable George M. Bourquin, Judge thereof, to grant the defendant a new trial upon the ground and for the reasons:

I.

That upon the trial of said cause the verdict of the jury rendered therein is excessive and appears to have been given under the influence of passion and prejudice.

II.

That the evidence is insufficient to justify the verdict rendered and judgment entered thereon, or any verdict or judgment herein, among others in the following particulars:

a. It appears from the evidence submitted in the case that the defendant's rights of entry upon said premises was under written contract, or agreement, and that all of the damages claimed by the plaintiff, and to which evidence was offered was due to and approximately caused by causes that were expressly relieved and excused from by the agreement of the parties. [23]

b. From all of the evidence introduced upon the trial of this case it appears that the injuries, if any, that the plaintiff sustained to his land and premises were due to and approximately caused by causes, some of which were from defendant's action, some of which were by the action of others, and most of which were by action on the part of the defendant, damages for which had been ex-

pressly waived by the plaintiff by the lease agreement existing between the parties. From the evidence it cannot be ascertained whether or not the damage was due to causes for which the defendant might be responsible, or causes for which he would not be responsible, and there is such a confusion in evidence that it would seem insufficient or lack of proof on the part of the plaintiff and failure to prove his case as laid.

c. The evidence is totally insufficient to sustain a verdict in the amount awarded by the jury, in that there is no proof to justify such a sum in damages.

III.

Errors at law occurring at the trial, which said errors at law are as follows:

a. The Court erred in permitting testimony to be introduced with a view to showing damages as to the structures, to wit, pumping plant, pipe-lines, water-lines, and telephone lines upon the premises, to which evidence timely objections were made by the defendant, and by the Court overruled, defendant reserving its objections by exception.

b. The Court erred in permitting testimony to be introduced relative to roads built upon said premises, or used thereon upon the ground and for the reason that the building and use of roads upon said premises was authorized by the lease [24] agreement between the parties and a necessary incident thereto, to which evidence timely objections were made by the defendant, and by the

Court overruled, defendant preserving its objections by exception.

c. The Court erred in refusing to strike out the witness' answer to the following question:

“Q. What was the value of your entire tract of land prior to the entry by the Frantz Corporation?

“A. I have been offered seventy-five dollars an acre for it all the way through.” (Tr. page 15.)

d. The Court erred in permitting testimony relative to the damages by loss of crop of sweet clover, to which evidence timely objections were made by the defendant, and by the Court overruled, defendant preserving its objections by exception.

e. The Court erred in permitting witness, Al. Dixon, to answer the following question:

“Q. What, in your judgment, is the value of the land since those instrumentalities have been placed upon the property?” (Tr. 27.)

f. The Court erred in refusing to allow the witness, Landz, to testify as to what road was first used when the oil development first started, and in sustaining the plaintiff's objection to that testimony. (Tr. 55.)

g. The Court erred in sustaining the plaintiff's objection to the following question asked of witness Lantz:

“Q. Now, this hauling in, was that done by contract on a per pound basis, or did you do the hauling yourself?” (Tr. 55.)

h. The Court erred in permitting the following question to be answered by the witness Sonntag:

Q. "What was the cost of that pumping station?" (Tr. 65, 66.) [25]

i. The Court erred in permitting the following question to be answered by the witness Sonntag:

"A. How many wells have been drilled across the river by the Frantz Corporation where the road through the Fifer tract was used in the hauling of material?" (Tr. 66.)

j. The Court erred in sustaining plaintiff's objection to the following question asked the witness Sontagg:

"Q. Have you had occasion to rent the surface-right privileges for use similar to what you have here under substantially similar conditions as are in existence on the Fifer tract?" and in sustaining plaintiff's objection to the following question asked the same witness:

"Q. From your experience, operating under conditions similar to those on the Fifer tract, what would you say was a fair rental value for the use of the Fifer tract for the use you have put it to?"

and the Court erred in sustaining the plaintiff's objection to the defendant's written offer of proof which is in words and figures as follows, to wit:

"We offer to prove by the witness on the stand, L. F. Sonntag, that he is experienced in the renting of similar lands to the Fifer lands for surface use purposes such as the Frantz Corporation is making of the lands

here in controversy, and that a reasonable rental value of such lands for the purposes such as the Frantz Corporation is making of these lands is One Hundred Dollars per year.

Mr. FORD.—To which plaintiff objects on the ground that the witness has not shown himself qualified, and from his testimony it appears that his experience in the renting of land was not had in or near the land in controversy, but, on the contrary, was had in adjoining states; and for the further reason that the rental value of said land for oil and gas mining purposes is not a material issue in this case.

“The COURT.—The offer is denied and exception may be noted.” (Tr. 69, 70.)

k. The Court erred in sustaining plaintiff's objection to the question asked of the witness Hilger relative to the value of alfalfa hay in Fergus County, Montana, during the years 1920, 1921 and 1922. (Tr. 76, 77.) [26]

l. The Court erred in sustaining plaintiff's objection to the following question asked of the witness Downing:

“Q. From your knowledge and from the number of visits you have made there, are these assumptions real or mythical, as given you by Mr. Ford?” (Tr. 82.)

IV.

The Court erred in refusing defendant's motion for directed verdict.

V.

The Court erred in its instructions to the jury in such portions of the instructions as exception was taken to by the defendant, which objections and exceptions are as follows:

“Are there any exceptions for the plaintiff?

Mr. FORD.—No exceptions.

The COURT.—Any for the defendant?

Mr. BROWN.—Defendant excepts to that portion of the Court's instruction which leaves out the oil lines as one of the permanent structures.

We except to that portion of the instruction which says they are liable for the destruction of crops, no matter whether necessary for the taking of oil from these lands or not, for if the taking was necessary it would be out of the lease.

We except to that portion of the instruction which says that they are not justified in using this land in connection with the development of any other, for the reason that the evidence shows that there might be, in case of operation and to facilitate development, conditions, under which this would inure to the land in question.

We object to the consideration by the Court in its instructions of the damage to the fences *in toto* as coming from the acts of this defendant, and its instruction, for the reason that the evidence shows that there may have been damage to the fences from other outside or inde-

pendent operators, and the jury are entitled to consider whether or not this was from this defendant or was from trespassers, and except to the Court's instruction to fix responsibility entirely upon the defendant and no other.

The COURT.—Let me interrupt you right there; that is grossly wrong. The Court told the jury that if they can point out to any destruction by others, this defendant is not liable for it, the defendant is only liable for the destruction [27] of the fence so far as he destroyed it.

Mr. BROWN.—I did not mean to misquote. What I mean is the question of confusion as to who caused it.

The COURT.—Yes, proceed.

Mr. BROWN.—And the defendant excepts to that portion of the instruction which allows the jury to consider the question of the destruction of the fences being entirely upon this defendant, or possibly upon it, for the reason that there is confusion upon the issue and no sufficient proof on which the cause should be submitted to the jury.

The defendant excepts to that portion of the instruction that gives as a measure of damages to land the value of the land before and the value of the land after, and also gives a measure of damages for fences and for loss of crops, in that there cannot be three rules of damages, to wit, a general loss and destruction of the land and also a general loss and destruction of its appurtenances; that there can be

but one rule, and that must be either the value of the things destroyed or lessened value in the property itself, and the instruction as given is not a correct rule of damages as applied in this case.”

Defendants asked for and was allowed exceptions as stated. This petition to be based upon the pleadings herein. A bill of exceptions to be hereafter settled herein, the minutes of the Court and Clerk's minutes herein.

WHEREFORE, the defendant prays that it be granted a new trial of said cause.

Dated this 28th day of July, 1923.

C. J. MARSHALL,
STEWART & BROWN,
Attorneys for Defendant.

Due personal service of within petition for new trial made and admitted and receipt of copy acknowledged this 30th day of July, 1923.

FORD & CHOATE,
Attorneys for Plaintiff.

Filed July 30, 1923. C. R. Garlow, Clerk. [28]

Thereafter, on August 7th, 1923, defendant's bill of exceptions was duly signed, settled, allowed and filed herein, being in the words and figures following, to wit: [29]

WITNESSES.

	Direct	Cross	Redirect	Recross
E. J. Fifer	1	16	22	
Al Dixon	23	27	29	
L. E. Routin	29	34		
Charles W. Sandridge	35	36		
Frank Fifer	36	None		
E. J. Fifer (Recalled)	37	37		
Motion to Amend Pleadings				37
Plaintiff rests				38
DEFENDANT'S CASE:				
Carl C. Adams	38	39		
Charles J. Marshall	40	None		
L. S. Landz	43	50	54	55
L. F. Sontag	56	64	68	
Defendant's Offer of Proof				69
David Hilger	70	73	76	78
Walter O. Downing	78	80	82	
Defendant rests				82
PLAINTIFF'S REBUTTAL:				
E. J. Fifer	82	82		
Defendant's Motion for Directed Verdict				83
Plaintiff's Motion for Directed Verdict				83
Court's Instructions to Jury				84
Defendant's Exceptions to Court's Instructions				94

In the District Court of the United States for the
District of Montana.

Case No. 1031.

E. J. FIFER,

Plaintiff,

vs.

THE FRANZ CORPORATION, a Corporation,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED That, heretofore, to wit, on the eighteenth day of June, A. D. 1923, at Great Falls, Montana, the above-entitled cause came on regularly for trial, before Honorable George M. Bourquin, Judge of the above-entitled Court, and a Jury of twelve persons, duly empanelled and sworn to try the issues in said cause; Messrs. Ford and Choate appearing for the plaintiff; Mr. Charles J. Marshall and Mr. John G. Brown appearing for the defendant; whereupon the following proceedings were had and done therein:

Testimony of E. J. Fifer, in His Own Behalf.

E. J. FIFER, the plaintiff herein, a witness called and sworn on his own behalf, testified as follows:

Direct Examination by Mr. FORD.

My name is E. J. Fifer. I reside now at Lewistown, Montana. I am the plaintiff in this action

(Testimony of E. J. Fifer.)

and am the owner of the land described in this complaint, and have owned it since the winter of 1913 and 1914. This land is located on the Mussellshell River in an L shape, in Sections 20 and 21. The Mussellshell River cuts off one corner of my east forty and I have got something like six or eight acres on the east side of the river. The east forty or maybe fifty acres, I don't know exactly how many acres, is irrigated with ditches from a coulee. It is built up from the south half, [31—1] comes from the bad lands down this coulee and filled in above water level; it is deposited vegetation and stuff that would wash in there maybe ten or fifteen feet deep. It is built-in bottom land. At the time I acquired this bottom land, it was timber, underbrush, willows and buck-brush. I cut and burned and cleaned it up and built ditches all over so the water would cover every bit of that east side of the river. The remaining 120 acres of the land, there is a coulee running up there about ten acres in that coulee, about similar land, filled in there, out of that west eighty, and then there is an L-40 there, and south it is filled in some, but of a little different character. There is a mountain on the south forty, on the one-half, on the east, and a mountain on the west, and it gives drainage between the mountains; it lies square in between, and there is a coulee comes down on the southwest corner which carries considerable water.

At the time this lease was entered into between myself and Mr. Franz, I had a four wire, galvanized

(Testimony of E. J. Fifer.)

wire, fence, cedar posts set all the way around; cross-fenced. The posts in the fence around were set twenty feet apart. The entire tract was surrounded with a fence of that character. I had a cross-fence at the east where my buildings were; I always called it between forty-five and fifty acres, and this irrigated land was cut off, that is, the east forty was fenced off. In addition to that east forty, there is about ten acres, or something like that, included in that cross-fence. There is 150 to 200 feet more to the west over a quarter of a mile. The road went right along the river, and I cut this off from the road to keep it all included, and ran from the corner of this cross-fence right around to the north fence, around to my house, leaving the road on the outside of my fence. It went across the corner of this forty-acre tract, followed the river all the way around; the southeast corner. It would be on the south and east side of the east forty-acre tract. The line runs a little northeast there. I had [32—2] hay corrals, stock corrals, a barn, sheds, cow sheds, ice houses, tool house, chicken-house, two houses 16 feet by 20, and another cellar and a chicken-house and a lavatory. These improvements outside of the lavatory, were made of logs.

With reference to the cultivation of this land, I had always, ever since I went there, cultivated, stayed there, right steady.

The COURT.—You were asked what you cultivated; tell us?

(Testimony of E. J. Fifer.)

The WITNESS.—Something like thirty-five acres in this one tract, on the east forty, and in the south forty I had about twenty-five acres more broken up there. On the east forty I had planted corn, vegetables, sugar beets and hay. There is a well there. I ran sugar beets, corn and hogs, and afterwards I turned it into hay and cattle. At the time the land was leased to Mr. Franz, I was growing principally hay on this east forty. Including that across the river, I had about thirty-five acres of hay; maybe a little more. There were something like four or five acres of that forty acre tract that were used for general gardening purposes. I had this twenty-five or thirty acre tract on the southwest sowed to sweet clover about the first of September. There were about thirty acres in sweet clover. The land in this coulee that runs up through the place, I had that sowed to sweet clover, reinforced the pasture all over with sweet clover, to make better pasture of it. The balance of the land that I have not described, I used that for pasture grazing land is what I figured that. At the time this lease was entered into, I was engaged in farming; hay and stock was what I was getting into, preparing for and getting into. The paper marked "Exhibit No. 1, for the Plaintiff," is the lease that I gave to the Franz people or Mr. Frank Franz.

Plaintiff's Exhibit No. 1, thereupon offered and received in evidence without objection, being read to the jury, is in words and figures as follows, to wit: [33—3]

(Testimony of E. J. Fifer.)

The WITNESS.—After the execution of this lease, the Franz Corporation, commenced hauling in sometime the last part of November, to commence drilling operations in that vicinity, and I think they spudded in in December, 1919. The Discovery well was located about 800 or 900 feet south of my land, of my south line, and also to the west; there is just one forty between the well and to the west. The Franz Corporation was carrying on these operations.

Q. And what other drilling operations did the Franz Corporation conduct in that,—in or near the vicinity of your land?

The COURT.—What does that have to do with this case?

Mr. FORD.—It shows that they used this land in connection with their general operations in the field.

The COURT.—Proceed.

WITNESS.—The boarding-house and camp was a couple of hundred feet off my place; they drilled the discovery well and the Franz-Charles 2; the discovery well in on the Charles land, and the O'Day well, lying south of me; they always had to cross me; then the wells in 2 and 18, which is located across the river in Garfield county. They had to haul all this through my bottom land.

Q. And in their operations in driving to and from those wells across the river, they passed through and upon your land?

A. They made a camp and they all pulled through to the camp.

(Testimony of E. J. Fifer.)

Mr. MARSHALL.—We object to these long answers.

The COURT.—Read the question.

The WITNESS.—They did. There were other operations in the vicinity of my land that I have not yet told you about. There is the Franz-Brown well, and the Franz-Brown well No. 1 and No. 2, three wells in there. In their general operations, hauling materials back and forth, I think the Franz people themselves had about five [34—4] four-horse teams. Quite a good many other people were employed by them at different times. In the earlier part of these operations, I have seen fifteen or twenty teams in twenty-four hours, that is, hired people, and everything, freighting back and forth. In their operations in hauling over and across my land, they came into my land near the northwest corner. They made a road there. At the time they commenced their operations, my fence was in a first-class shape, gates and everything. In hauling back and forth over my place, the Franz people opened the fence or gates; sometimes they didn't go through the gates at all; they would go through a fence, if they did, I don't think it was ever up twenty-four hours after that.

Mr. MARSHALL.—We object to what the witness thinks.

The COURT.—What fences did they tear down?

The WITNESS.—They tore down first on the north, then south, diagonally across the place. The fence now is practically all open everywhere, some

(Testimony of E. J. Fifer.)

gone, removed. In the early operations, in the first place, they opened the fence on the northeast and came diagonally across to their camp to the south; opened it then in two places, and then there was the gates; you know they hauled those big camp wagons and left the fences down; had to go north and south, and moved it, before they got their big camp built. After they would take down the fence, they were never repaired and put back up. I have gone over a good many times and did that. Lots of times the wire was tacked down to the lower post when they drove over it first, but other teams came along driving over it, and they would hook into that wire and pull it every old place, around over the place. In the spring of 1920, the fence was down different places around the place. In 1920 I rebuilt the fence and worked practically all that summer running stock and building fences. In the spring of 1920 before I commenced farming operations, my time was spent in repairing fences and hunting cattle, and fixing fences [35—5] and gates. In the Spring of 1920, I put in a full and complete new fence, about sixty rods by the coulee, where all the wire and posts were gone; I put that in the second time. The reasonable value for the materials and work that I performed there in making those repairs varies; the wire, I think I paid \$5.50 for the spools, and posts, and then my time. My time all that Summer was in that line of work. It ought to be worth \$100 a month, the way the wages were then, for my time, besides the materials. I started

(Testimony of E. J. Fifer.)

in about the first of March, 1920, and put in my time at that work up to September. I could not keep up the fences and keep the stock out of my land in 1920.

The range stock and Franz' horses were pastured on the clover that I had in on the South forty. It is a stock country around there; Mr. O'Day right adjoining me had 100 head, and there is stock on every side of us. There are quite a lot of stock ranges in that vicinity. I had a nice stand of clover on that thirty acre tract in the Spring of 1920, and did not get a thing from that crop during that season because the stock, range stock and horses, ate it up, kept it ate down, fed on it, and kept it right down to the ground.

On the tract of forty or forty-five acres on the east, in 1920, I got about forty-five and three-quarters tons of hay in one cutting. I only got that one cutting from that land that year. During a portion of the growing season, the stock broke in on me. I did not get anything out of it. I always cut it in October, the last crop, and they broke in on me along about September. I cut the first crop in 1920 right after the fourth, about the fifth; at that time, after I had cut the crop, the condition was fair; pretty good; about half of it was about first crop, about one-half a crop. I had been fighting all the time to keep the fence up, but after they had been cut, after the harvest, I was not so particular in regard to that; they kept breaking in, [36—6] and after the pasture got short outside of that they

(Testimony of E. J. Fifer.)

would break into this very green pasture. After cutting my first crop in 1920, I was not able to keep the range stock out of the pasture, and have got nothing from that place since cutting the crop in 1920. I got no second crop from that place. On the tract of land across the river, that was open to the public after the first crop but the river was up and protected it during the first crop. I let a fellow cut that that put this hay up. After the first crop from the land across the river, the river went down and it was like the rest of the field all over. I got but the one crop from that small tract across the river during the period of 1920. That was alfalfa.

The general conditions during the remainder of the season with reference to moisture were good; subirrigated ground, towards the river; it was good. Had the fences been up the rest of that year, I would have gotten two more cuttings of alfalfa from that land and field. In my judgment it would have gone a ton and a half per acre, per cutting, the last two crops, or, a total of three tons for the remainder of the season. I said I had about six acres across the river in that tract.

The plat marked "Exhibit No. 2 for Plaintiff" I have examined, and it represents pretty well this tract of land concerning which I have been testifying. The tract of land which I have been testifying about, to the east of the river, is the spot there in the lower corner. The value of the pasture upon the land after I had cut my crops for the year 1920, had my fences been up, the entire tract for 1920,

(Testimony of E. J. Fifer.)

would have been about \$150. I got no pasture from that place in 1920.

The fences in the spring of 1921 were torn down entirely and the entire tract of land was open to the range stock. Along about March, 1921, I went down on that piece of forty and fixed up the fence and drove the stock out. I couldn't do anything with reference to the other portions of the fence; the roads were all mixed up and cut up, [37—7] and I didn't try to do anything. That spring I repaired the fence all around the place, all around this forty acres. I was about three days there on the first time, and drove the stock all out, and fixed up the fence. I had to furnish posts and the wire to repair it. I should judge the reasonable value of my time and the materials furnished for that purpose was twenty or twenty-five dollars. There were no crops raised on any of this land in 1921. The moisture conditions in that country were all right in the spring to start with. Referring to the south forty that was planted to clover, in my judgment, considering the weather conditions, that tract in 1921 would have produced probably a ton to the acre, one crop; it was a little dry the last part of it. Considering the general conditions with reference to moisture in that year, in my opinion, the bottom land would have produced a usual crop for the first crop, and maybe a little shorter and pasture for the second. That tract in 1921 would have produced between thirty and forty tons, but I got nothing from it. In 1921, we had to keep the fence up

(Testimony of E. J. Fifer.)

around the forty acre tract. I sent my brother and his wife down there and they stayed all summer. We were not able to keep the fence up and keep the range stock and the stock belonging to the Franz Corporation out of the tract during the summer of 1921. The reason for the loss of my crop in 1921 was through the fences being torn down and the roads and the traffic and business through the place and the range stock.

In the spring of 1922 there were no fences kept up around the outside. The old man there had a little patch of garden fenced up. The outside fences were all torn down and scattered around and the land was open to the range stock during the year 1922, as much as any land is; open to the public. During the years 1921 and 1922, the range stock was grazing upon this land. The general conditions in that country with reference to moisture were a little better in the spring of 1922 than some of the other years. That thirty acre tract in the south forty in 1922, had it not been for the fact that the fences were down, [38—8] ought to have had two cuttings, and ought to have been about a ton and a half to the acre for each cutting. The forty acre tract on the river during 1922 should have produced about forty or forty-five tons; that does not include the hay that I would have received from the patch across the river, the east tract west of the river. In 1921 that tract across the river ought to have gone about two tons to the cutting to the acre, and three cuttings. In 1922 that same tract across

(Testimony of E. J. Fifer.)

the river should have produced about the same, two tons to the cutting. The market value of alfalfa hay in that community in the fall of 1920, in the stack, was about fifteen to seventeen dollars, along there, eighteen dollars. The cost of the cutting and stacking was about two dollars a ton, I suppose. In 1921, I don't know what the market value of the hay was in that vicinity. I know some alfalfa sold at twenty dollars. I don't know what the market value of clover was in that vicinity in 1922. In 1921 the market value of blue joint in that vicinity was thirty to forty. I don't know what the market value of blue joint was in the fall of 1922. I wasn't right in that locality. The value of the pasturage on this tract of land for the season of 1921 was about one hundred and fifty dollars, and its value in the fall of 1922 was about the same; about a dollar an acre with everything cut.

During all of this period of time, the Franz Corporation was conducting its operations, as I testified this morning. By an examination of the plat, you can tell just what roads were established on my property by the Franz Corporation. This plat correctly shows the roads that were established on my property by the Franz people on their lease. Most of those roads are graded.

Q. Now, in the operations and hauling back and forth through there, can you tell us whether or not they used the roads entirely?

The COURT.—How do you mean?

(Testimony of E. J. Fifer.)

Mr. FORD.—Well, if they just used the roads.
[39—9]

The COURT.—If they limited themselves to the road?

Mr. FORD.—Yes, sir.

The WITNESS.—No, sir; not altogether. If when it became necessary for them to turn off here and there in this direction and that direction, they did so, wherever they were hauling to.

Q. Now, what pipe-lines, power houses, and so forth, were constructed upon your place by the Franz Corporation, if you know?

A. Why, the pumping-plant and pipe-lines—water-line and pipe-line and pumping-plant.

Q. What is the foundation of the pumping-plant built of? A. Cement.

Mr. MARSHALL.—We desire to offer an objection to this line of testimony as proof of damage. The damage alleged so far and proved up to the present time is loss of pasturage a year and loss of alfalfa each year. If he has lost the use of his premises he has proved the damage. This wouldn't be an element of damage on the pleading in the case.

Mr. FORD.—It is a permanent injury to his property.

The COURT.—Well, what is your theory in respect to that, the pumping-plant?

Mr. FORD.—Our theory is if there have been any permanent damages effected upon this property that we are entitled to recover for them.

The COURT.—In what way, permanent damage?

(Testimony of E. J. Fifer.)

Mr. FORD.—Well, for example, take the power station built there, concrete foundation.

The COURT.—The pumping-plant, is that what you mean?

Mr. FORD.—Yes, the pumping-plant.

The COURT.—Is it there yet?

Mr. FORD.—It is there yet.

The COURT.—You have a right to show that. You can proceed. [40—10]

Whereupon the defendant then and there duly excepted to the ruling of the court.

The WITNESS.—The Franz Corporation also placed upon the property five or six tanks, storage tanks. There have also been built three pipe-lines in and upon the property.

The COURT.—The lease provides for this.

Mr. FORD.—Yes, but it also provides for any damage done, that they will pay any damage done to growing crops, fences or any other damages.

The COURT.—How can you call it a damage when the contract calls for them to do that, both parties; that is, if they were built for this land?

Mr. FORD.—We will show they were used in connection with their general operations, not only for this land but for their operations on other lands.

The COURT.—Can you make any showing that they were built for use in connection with this land?

Mr. FORD.—In connection with this land?

The COURT.—Can you show a segregation of damages because they were used in connection with other land?

(Testimony of E. J. Fifer.)

Mr. FORD.—Possibly not, but the position we take is that they had a right to go in and build these power-lines or tanks or any other work necessary in connection with their operations, they had that right, but they have stipulated that whatever the damage is that they will pay for.

The COURT.—Yes, growing crops, fences and other damages. I doubt if you can find any authority, in view of the contract, in the operation of mining or leasing of your premises, so far as the soil is concerned, that any of these necessary operations would be considered a damage. You might as well sink a score of wells and say he is damaged in the piles of slush thrown out, [41—11] and in mining the tunnels run. Have you any authority to sustain you?

Mr. FORD.—So far we have not. This is a peculiar lease because of the written portion contained in here, if the Court will examine the lease; it is a printed lease, but this clause is written in, the parties having contracted to pay the damage. I am frank to say we can find no authority.

The COURT.—When we see some of these papers come into Court, we are frank to say we don't see how they can do business without a guardian.

Mr. FORD.—But a lease of this character is strictly construed against the lessee and in favor of the lessor, and the lessee having contracted to pay any damage, it is not limited, it is unlimited, to pay plaintiff damages that resulted.

The COURT.—Well, I will hold that any damage like to the crops or fences that these parties would

(Testimony of E. J. Fifer.)

do in carrying on their legitimate operations would of course be within that term of the lease I think, but damage which would accrue by reason of their sinking a well or placing a pipe-line to convey the oil or water for the benefit of both parties, the injury that would do wouldn't be called damages. I can't understand any principle of law that would call that a damage; if it is a damage it is without injury, because it is the very thing you contemplate shall be done; they might carry on their operations, such as they have bound themselves to do by this lease, without doing any damage to crops or to fences if they were careful enough, and hence not necessary, but these things that they must necessarily do, like placing your pipe-line, sinking your well, pumping, I don't think that even this lease, as crudely drawn, would consider that a damage. Certainly parties acting together wouldn't call that a damage to the land; no, that is the very thing they were going to do to pour wealth into the pockets of both of them. I think [42—12] I would place that construction on it, in the absence of any authority from the standpoint of principle and reason; but if they have placed on there instrumentalities that are not for this particular land, to carry out this particular lease, seeking to make it the base of operations for their other surrounding lands, that were not contemplated by the parties, I think you might show it; it will be a matter to be shown to the jury; make the best proof of any damage on that that you can and it will be for the jury to determine to the best of their judgment whether it is

(Testimony of E. J. Fifer.)

in fact a damage in the sense of the word. I think you may show the entire situation as far as you think it necessary.

The WITNESS.—Operations were commenced upon my place by the Franz Corporation in 1921, I believe. The Montacal well was brought in in 1921.

The COURT.—Is that the Frantz Corporation?

Mr. FORD.—The Franz Corporation.

The COURT.—The defendant?

Mr. FORD.—The defendant.

The COURT.—That is when they commenced?

Mr. FORD.—That is when they commenced operating on their property drilling for oil.

The COURT.—You are limiting it to the operation of drilling?

Mr. FORD.—That is what I should have said.

The COURT.—I assume that this showing you have so far made is assigned by you to the Franz Corporation?

Mr. FORD.—Yes.

The WITNESS.—If I remember right, it was in May, 1921, that the Franz Corporation commenced drilling upon my land. I think it was in 1921 that the power station and these tanks were constructed upon my place; about the same time, if I remember right, that the Franz people commenced drilling upon the place for oil. [43—13]

The power station, in connection with the operations in the field, is used for the storage of oil, for my place and other places, they have got storage tanks there when they pump from there out to Winnett; I think they have a couple of 500-barrel

(Testimony of E. J. Fifer.)

tanks. The oil produced from the wells on my place is stored in those tanks, and I think from the Charles lease and probably 26. I haven't run out the pipe-line exactly, but the storage tanks are right there close to the power-plant. They also have a water-line running on top of the ground, a two-inch line. The water is taken from the O'Day well, off of my land, and from the power-station it is pumped to the west camp and wherever they want to use it.

Q. Now, Mr. Fifer, will you tell us what in your judgment has been the damage to your premises by reason of the construction of these roads that you have testified to, the building of the power-station and such other of those matters, these tanks, etc., that has resulted in damage to your place.

Mr. MARSHALL.—We will object to that, upon the grounds and for the reason it is not a proper proof for damages and not the proper proof of damages under the pleadings in this case.

The COURT.—What were these roads built for, for his land or the other land?

Mr. FORD.—They were built, I think the testimony shows, before they commenced drilling on his land, in the general operations in the field. It is alleged they were used for this purpose in connection with general operations and that is admitted in the answer.

The COURT.—I think you can get at that portion of it then—that certainly is not within the lease at all if roads were put on there to facilitate operations on other lands; that is a plain ordinary tort; I think you can show that by showing the value of

(Testimony of E. J. Fifer.)

the land before it was done and value of [44—14] the land afterwards. That is the proper rule for damages.

Q. Mr. Fifer, referring now to the tract of land west of the river in the east forty, upon which the power-station and those lines are built, what was the value of that land prior to the placing of those buildings and roads upon the property?

Mr. MARSHALL.—We will object upon the ground and for the reason the witness is not qualified to testify to the value of those lands prior to the encroachment or otherwise or at all.

The COURT.—I think so; he is the owner; every man is assumed to know something within reason of the value of his own property. Overruled.

Whereupon the defendant then and there duly excepted to the ruling of the Court.

The WITNESS.—It being covered with water and under ditches, I think it is worth about one hundred and fifty to seventy-five dollars an acre. Confined to this strip here, and after the use and the placing of those buildings and other instrumentalities upon the place by the defendant, now, I wouldn't know how to make taxes off of it.

The COURT.—What is its value to sell to anyone not bound to buy and to whom you are not obliged to sell?

The WITNESS.—A thousand dollars would be a big price, for all of it.

Q. What was the value of your entire tract of land prior to the entry by the Franz Corporation?

(Testimony of E. J. Fifer.)

A. I have been offered seventy-five dollars an acre for it all the way through.

Mr. MARSHALL.—We move that the answer be stricken as not responsive.

Motion denied and exception noted.

The WITNESS.—Seventy-five dollars an acre. After the entry upon the land by the Franz Corporation and the establishment of these roads and power-station and pipe-lines, and so forth, it is of no value for what I want to use it for. At that time, after their entry [45—15] and the construction of these roads, its value was a couple of thousand dollars; something like that. This plat shows in a general way the coulee that comes down through my land. From 1914 until I left there in 1920 I had appropriated the waters from that coulee. I had built ditches and kept them up and made them all across that forty down there. The water was taken from the coulee at its mouth, and run down into the field, and then the tract is split off every way on the high places. I had a complete distributing system and I could cover every foot of this forty-acre bottom on the west side of the river. The tract on the south forty that is in sweet clover, a little coulee ran in the southwest corner of that forty, and I ran right along the west side of it a ditch to lead the water high upon the hill so as to distribute it out over this ground.

That plat indicates the cross-fence that I built along about fifty acres there. The cross-fence comes down and is tied to the south line about in the direction you have indicated there, by the letters A, B.

(Testimony of E. J. Fifer.)

Then I had a gate right in there. My line fence is about as you indicate there by the letters C, D. At the time this action was brought in 1922, all of the fences were torn down. I am familiar with the cost of construction of fences. In my judgment it would cost about sixty dollars a quarter, for the red cedar posts and four galvanized wire, to replace the fences that have been torn down in connection with the operations of the Franz Corporation. I had three quarters on the north, two on the west, one on the south and then on the east and south; this cross-fence here, a quarter, and then one in and around, and a line fence I described a few minutes ago, and one crossing the river. I believe the price of two dollars per ton would cover the cost of producing and stacking the hay during the years 1920, 1921 and 1922.

Cross-examination.

(By Mr. MARSHALL.)

The WITNESS.—I filed on this land as a homestead in the winter of [46—16] 1913 and 1914. I squatted it first. When I first went down there and located on the land, it was surveyed, but hadn't been accepted by the Government. My filing was made in the winter of 1913 and 1914, and I submitted my final proof in September of 1914, I think. The land is joined immediately on the north by section 16, a school section. I have got a fence along my north line. I built all of that fence south of the school section, in 1914 and 1915. I have three forties running along the north side and one forty

(Testimony of E. J. Fifer.)

off to the south. I run for half a mile on 16 and a quarter of a mile on 17, on the north. In the fall of 1919 I gave to Frank Franz an oil and gas lease upon this acreage, which has been introduced as an exhibit in this case. In the fall of 1919 the Franz Corporation began operations looking toward the drilling of a well in the immediate vicinity of my land. The well was south of me, a quarter less than two hundred and twenty feet south of my south line. It was an offset to Mr. O'Day's. I think it was about the middle of December that they was rigging up for to begin active drilling operations upon the Charles tract. In 1913, when I went down to squat upon this ranch, there was no public highway passing over the property. There was no highway passing over my property south of me right down the river. It was east of me. Beginning at the very extreme northwest corner there was a trail there, passing down, and sometimes it was used by the settlers on the Musselshell river for the purpose of reaching up in the Cat Creek field proper. That was before the Franz people built a new road through there. From 1915 up to 1919, I had a gate to the entrance of my northwest corner to let my stock out to the public land. It was a four wire fence, a farmer's gate. That wasn't a road running along down through my place to the center line of the Musselshell river. It was an outlet from my field to the coulee there. At the time when I first went down to my place, there was a crossing just below my place there. They crossed just below my place. It was known as Sand

(Testimony of E. J. Fifer.)

Springs Crossing. As early as 1908 there was a ford, but not [47—17] opposite my house; there was two fords, but further down the river. The ford did not come across my place; it hit on 16, but afterwards we made a ford right there by my barn.

I recognize the photograph which you hand me as being that of my barn and hay, some of my buildings. This photograph which you hand me I recognize as being a photograph of the river bottom just below my house on the flat there, and my east line fence running across the river there. This third photograph which you hand me I don't recognize as being a photograph of my garden, as to looking towards the power plant of the company. That looks somewheres in 16, north of my place.

The COURT.—What is the object of these photographs?

Mr. MARSHALL.—The object of this is to show the actual condition of the property.

The COURT.—Haven't you the photographer who took them?

Mr. MARSHALL.—Yes.

The COURT.—You can identify them in due course of time. No use puzzling the witness.

Mr. MARSHALL.—All right.

The WITNESS.—The Franz people have drilled two wells on my property, one known as Fifer One and the other as Fifer Two. Fifer One is drilled as an offset to Charles well on the south line, on the east forty. That is the well in the extreme east forty there, as an offset to the Charles Number 2.

(Testimony of E. J. Fifer.)

It was necessary for the Franz Corporation in drilling that well to haul material to the place, materials, rig timbers, casing and matters of that kind. They hauled this material from the West Camp somewhere, and it was necessary for them to cross down across my property for that purpose. They drilled Fifer Number Two well at the northwest corner, the northwest of the northwest of Section 21. That is an offset well. It was necessary for the Franz people to haul material such as rig timbers and casing and matters of that kind for the purpose of drilling this well. I [48—18] guess that is the road that is represented on that plat where they hauled this material. I don't know, because I was not on the place all the time when the wells were being drilled. I left the place in 1920; I was back and forth all the time. I was there when they were drilling the Franz-Fifer Number 1 and Franz-Fifer Number 2, and knew it was necessary for these people to use these highways on my place for hauling the material for those wells. The oil from Fifer Number 1 and Fifer Number 2 was pumped into the storage tanks on the eastern end of the field, and then pumped from that point to Winnett, I suppose. It is necessary to use the pipe-lines across my land for the purpose of gathering my oil and other oils, and depositing it in the tanks, and then in turn pumping it back to the town of Winnett. This pump-house is used for the purpose of pumping water and oil from my place and other premises. This 160 acres

(Testimony of E. J. Fifer.)

of land owned by me is something like 26 miles from the town of Winnett. Winnett is my nearest railroad point, and is the point to which this oil is transported. I suppose it is necessary to use water for the drilling of those oil wells by the Franz company. It was necessary to lay these pipelines for the purpose of carrying oil to drill the wells on my place in connection with the operations of the Franz lease, and other places, too. There is a telephone line across my property to the power plant that is used in connection with the operation of this and other properties in that vicinity. There is a public highway running the extreme length of my place, coming in at the extreme northwest corner, coming down the center of the 120 acres to the Musselshell river. It is graded now; I don't know whether Fergus County owns it or not; the Franz Corporation built it. The Montecal people have been operating a portion of my lands; Franz sold and peddled eighty acres of it. They have been operating a part of my land, but I don't know whether through legitimate contracts or not. The Montecal people have drilled one well upon my acreage, and they have drilled another, and it was necessary for them in the drilling of these wells to use highways and roads [49—19] for the purpose of hauling material in. The Montecal well is a producing well, but I don't know whether that oil is transported down to the large tanks, or whether it is turned into the pipe-line direct. On the extreme south forty of mine there were two other

(Testimony of E. J. Fifer.)

outfits occupying that property, the Williams Syndicate well was drilled in this southern point, and also the Lucky Lucile. It was also necessary, in connection with the drilling of those wells, to haul material across my land. It was also necessary to lay pipe-lines for the purpose of having water to drill those wells, upon my acreage. I don't know exactly how many acres I have actually got in meadow alfalfa land. I measured it once by tap line that ran on the eighty-rod spool of wire, and then a little more. There is a raise about three or four feet high around the meadow lands on the west and on the south. My irrigation ditch runs up to the bottom of that bluff. I opened it above just above on 17, is where the notice was put up; and cut that ditch around and built it up, confining it to the channel. For the purpose of irrigating this land, my meadow land and alfalfa land, I take the water from Brown's Coulee. That is the ranch adjoining me on the north. I have appropriated fifty miner's inches for that purpose, and when there is water that water is conveyed down through the coulee to my ditch on this high bank. There are some springs up the coulee, and they run into this coulee and down the coulee. You are correct when you say that the waters ran down through the coulee and out here under this bank where the irrigating ditch runs, and then my laterals spread out over the meadow and the alfalfa field. I have in the neighborhood of five or six acres over across the river that is not irrigated. It subirrigates

(Testimony of E. J. Fifer.)

from the river. The Franz people have a road that runs right across that into Mitchell's. This map does not show any roads over across the river. I don't think the Franz people occupy any of this land with pipe-lines across the river. That section is all open to the public. The other [50—20] fence is torn down; it all runs off and is cut off from it on the outside. The only point of entrance to my place to the north and west is right by my house, is where the road went across this ford before you people got in there, and went right to my northeast corner. That is the road that runs in front of my house and into the school section. The county road or public highway enters my property at the northwest corner now. It hits my place exactly in the center, right straight through pretty near three quarters of a mile. This land lying north and south is all sage-brush and cactus. When you get up above the meadow, going north, where all of these operations are concerned, you hit the hill there; the bottom land is at the foot of the hill. The rest of it is all sage-brush land. It is all broken land up north of me. There are no hills on mine at all. There is a portion of level ground over here on my extreme southern quarter, and to the west is hills, all the way west. There is sage-brush and cactus on all of those hills. I claim that with my feed and pasture, I would get \$150.00 a year, including 1921 and 1922, for that pasture land. I did get it, selling it that way, taking stock and feeding them. By selling the hay harvested and

(Testimony of E. J. Fifer.)

renting the pasture with it, would bring me \$150.00 a year. I had to have feed to feed them during a storm, and pasture; then, I could sell it separate and get a good price. In 1921 and 1922 it was of no value for that purpose because there were no fences. I left the place and moved to Lewistown late in the fall of 1920. In 1921, in the spring I tried to save that little garden there, put out a garden and this meadow and ran the stock out and fixed the fence up, and then my brother came out. The last two years I have not had it leased. There was an osteopath doctor camped there. Mr. Crawford has a garden there. He stayed there as much as he did last year; he works there, doctor of osteopath business, and stays there and raises a little garden. In 1920, when the Franz people entered upon this land for the purpose of developing [51—21] it in connection with other lands, I raised a good crop of alfalfa that year; that was the first year. I cut over that one patch and got something like forty-five tons. In 1921 I did not cut any at all, and in 1922 I wasn't there. The old fellow cut a little. There is a stack of hay there now that has been there since 1920. I haven't sold that. When I noticed the fences were down I certainly did attempt to repair them so the range stock couldn't get in there, but I was not successful in keeping them up. As a matter of fact, the range cattle got on to the premises. I had the meadow all cross-fenced. The Franz Corporation or any other corporation did not tear down my cross-

(Testimony of E. J. Fifer.)

fence the first year. I was kept pretty busy that year, that was the first year that they were in there, trying to keep all of it up and gave it all up except this one patch the hay was in until the hay was cut. In 1920 practically no injury was done to the meadow lands because the fence was kept up until after the first crop. Under water there I ordinarily would get two crops of hay. I have cut two crops several years; in the last five years, I don't think I have. Sometimes I would cut a few acres out and leave a good pasture; that is where I would feed it all. This ranch is right on the bottom, in the breaks of the Musselshell river. The meadow land is right down in the bottom; the breaks are surrounding it; that is the reason it makes it good; you have good pasture and good range, and that is what makes it worth more.

Redirect Examination.

(By Mr. FORD.)

The WITNESS.—At the time the Franz people came into this country and operating in the vicinity of my land, there was a main traveled highway east of me. At that time, through my property they followed the river bank and went out through a gate. There was a gate went out right straight west. That road went straight out and then went south. The road that went through my field came in right here and ran right down and followed the river right down, the river bank, and we had a gate in there, and it came out and went right straight south. There [52—22] were no roads whatever

(Testimony of E. J. Fifer.)

leading from the west end of my place over across the place. There were no public roads of any kind other than the one I have indicated, along the bank of my place, and I built that one. The reason I left my place in the fall of 1920 was that I sold off my cattle and chickens, because I couldn't keep my place and operate it, because the fences were torn down and kept torn down, and I tried all summer to keep them up, and I sold my stuff until further operations, until they either got out of there so that I could start in again and start in new if they didn't make a success.

Witness excused.

Testimony of Al. Dixon, for Plaintiff.

Whereupon AL. DIXON, called and sworn as a witness on behalf of the plaintiff testified as follows:

Direct Examination.

(By Mr. FORD.)

My name is Al Dixon. I live on the Musselshell river, about one mile north of the place owned by Mr. Fifer. I am acquainted with the Fifer place and have been ever since he came into the country. I am acquainted with the improvements upon the place during the year 1919. I know that the place was fenced. At that time there was a fence all the way around the outside of the place, a good four-wire fence, with posts twenty feet apart. That irrigated piece of land was fenced in with a four-wire fence, and then he had a little lane on the

(Testimony of Al. Dixon.)

southeast of that irrigated piece, and he had that so he could shut it in and use it for pasture, and he had a piece of fence on each side of the river. I am familiar with his irrigation system there. The coulee came down and opened up about the edge of that tract, and he protected the banks on that coulee some so as to fetch it down on to his land, and he made laterals and ditches and spread the water out there. I have seen all of that bottom land flooded with the waters that came from that coulee. I am familiar with this south forty acres. It is kind of a basin; there is a hill on the east of it. A portion of the hill comes inside of the fence, and on the west of the hill a portion of it comes inside the fence [53—23] and the northwest corner of it, there is some rough breaky kind of coulees, but the big portion of it is a basin. Mr. Fifer plowed some furrows and made a piece of a ditch there, with reference to distributing any flood waters that might come down from the hills. The effect of the plowing of those furrows would be to the benefit of throwing that water out over that ground south and east. I know the general character of this land across the river. In 1920 he had alfalfa planted and growing in there. The general moisture conditions in that country in 1920 were good. I was growing alfalfa at that time myself.

Q. What, in your opinion, how many tons of hay could have been harvested from this tract of land across the river during the year 1920?

Mr. MARSHALL.—We will object upon the

(Testimony of Al. Dixon.)

ground and for the reason the witness is not qualified.

The COURT.—Well, do you know the land?

A. Yes, sir.

The COURT.—I think he may answer. Overruled.

Whereupon the defendant then and there duly excepted to the ruling of the Court.

The WITNESS.—I saw that ground before they cut the first crop and when they were cutting it, and I would consider a ton or better to the acre. In my judgment that land would have been safe for a second crop. I believe on the second crop it would have produced a ton or better. On a third crop, there is a possible show for something. I knew there was a crop planted in the south quarter, but I paid no attention to it. Clover yields in that country on similar lands to this south forty anywhere from a ton to two tons to the acre. I know what other lands in this vicinity produce. I paid no particular attention to them in the year 1920; just in riding through there and seeing them, or seeing the size of the grass, it would be safe to say it would go a ton to the acre. [54—24] Considering what other lands produced and the general conditions, in 1920, I would say this thirty or forty acres in sweet clover would have produced a ton to the acre. The value of the pasturage on the entire tract in 1920 after the crops were harvested would be about a dollar an acre. I don't know what the general conditions in that vicinity were in the sum-

(Testimony of Al. Dixon.)

mer of 1921; I wasn't there. I returned to that country about the middle of February, 1922. The general conditions with reference to moisture in that locality in 1922 were good. In 1922, I believe the forty acre meadow that was raising blue-joint would have produced thirty-five or forty tons. The tract across the river would have produced in that year on the first cutting a ton and a half or two tons to the acre. I believe it would have produced a second crop in 1922. The production of that crop at that time would have been a ton or a ton and a half.

Q. And what in your judgment would have been the yield per acre, what would have been the yield of the sweet clover in the south portion of the south forty? A. A ton and a half.

Mr. MARSHALL.—We object to that because there is no evidence to show it was in sweet clover in 1922.

Mr. FORD.—No, there was no crop.

The COURT.—I suppose that is what they are complaining of.

Mr. MARSHALL.—There is no proof with reference to a crop in 1920, 1921 or 1922.

The COURT.—My recollection is that the witness testified he had put in sweet clover; I don't know what year he says he put it in.

Mr. FORD.—The fall of 1919.

The COURT.—Could we take judicial notice that it is a perennial crop or is it an annual?

(Testimony of Al. Dixon.)

Q. Does sweet clover require sowing each year?

A. No, sir.

Q. It is a perennial crop? A. It is a biennial crop, if I understand it right. [55—25]

The COURT.—The objection will be overruled?

Whereupon, the defendant then and there duly excepted to the ruling of the Court.

The WITNESS.—I said in my judgment it would have produced in 1922 a ton or better to the acre. In my judgment there would not have been a second crop. The value of the pasturage upon the entire tract for the year 1922 would have been about a dollar an acre. The market value of hay, clover and alfalfa, in the fall of 1920 was \$15.00 a ton in the stack, but I don't know what the market value of the blue joint was. The relative value of blue joint is considered pretty near twice as good as alfalfa, and worth twice as much. The alfalfa was selling for \$15.00 in the stack. The market value of alfalfa and clover in that vicinity in the fall of 1922 was \$15.00. With the ordinary care that is given alfalfa or sweet clover, after it is once planted, if it is not irrigated, why, two dollars a ton would cover the cost in that community to produce, cut and stack alfalfa and blue joint; that is, not irrigated. There would be an additional charge, of course, if the land was irrigated. I wouldn't undertake to answer what it would cost per acre to irrigate this bottom land of Mr. Fifer's, because it might mean considerable work and it might mean a little. I am acquainted with the

(Testimony of Al. Dixon.)

value of property in the immediate vicinity of this land to some extent. I have an idea as to the value of this Fifer tract of land prior to the entry, or at the time of the entry by the Franz people in 1920; I don't know what he wanted for it, though. The idea is based upon what grew on it, what money was derived from it. There is no other lands in that vicinity that will compare up with that irrigated land, because we haven't got facilities to irrigate. When we irrigate it costs money. That is the only irrigated land in that country, right in that vicinity.

Q. What, in your judgment, was the value of this land in [56—26] 1919 at the time of the entry by the Franz people?

Mr. MARSHALL.—We object on the ground that the witness is not qualified to answer, proper foundation has not been laid.

The COURT.—I think he may answer. Overruled.

Whereupon the defendant then and there duly excepted to the ruling of the Court.

The WITNESS.—A matter of sixty-five to seventy dollars an acre. I am familiar with the roads, buildings, pipe-lines and power-house and so forth that have been placed upon there since the entry by the Franz people.

Q. What, in your judgment, is the value of the land since those instrumentalities have been placed upon the property?

Mr. MARSHALL.—We offer the same objections

(Testimony of Al. Dixon.)

as to the proof; not the proper element of damage under the pleadings in this case.

The COURT.—You may answer. Overruled.

Whereupon the defendant then and there duly excepted to the ruling of the Court.

The WITNESS.—Five dollars an acre. I know in a general way the cost of building fences in that country. In my judgment, it would cost to build a mile of fence, four wires, galvanized wire, with cedar posts twenty feet apart, about \$250.00.

Cross-examination by Mr. MARSHALL.

The WITNESS.—I know of land having been sold in that immediate vicinity during the past ten years. There was a place sold at Mosby nine years ago. That is eight miles away. That was the Charles place, and the price paid for it was \$25.00 an acre, I understand; it is all hearsay with me. I don't know that of my own personal knowledge. I don't know whether the school section to the north of this particular tract of land was sold or not. I have been told it was sold, but that is hearsay. I base the value of \$75.00 an acre on this land on the money derived from it, raising crops on it. It depends on how hard a man works, on [57—27 how much of this land could be cropped. There is considerable of that entire one hundred and sixty acres that can be farmed successfully, and that is not farmed. In my opinion, there is thirty-five or forty acres of this meadow land on this place of the irrigated land. There has been alfalfa on all of this place, but the blue joint has

(Testimony of Al. Dixon.)

killed it out a good deal. Across the river there are about six or eight acres of alfalfa. There is possibly two or three acres that have been in garden for the past three years and is in garden. Outside of the meadow, the alfalfa and the garden, there has been a part of the south forty that has been farmed during the time that I have lived there. I never measured it to find out how much, but I have seen a crop growing on probably half of it. That was in oats planted by Mr. Fifer, I believe in 1915, as near as I can recollect. I have a farm down there and raise a few cattle. This Fifer place is bounded on the north by the school section, and that is under lease to a Mr. Weaver, who is in the stock business, and also bounded on the north by Harry Brown's homestead, which is patented land. On the south it is bounded by the Charles tract and all the country down there is a stock country. This place is in the breaks of the Mussellshell river and a part of it goes down in the bottom land. I have seen the Musselshell River overflow there in the spring in high water, and in the winter when the ice would go out, and in the summer they would cut hay, two tons of hay on it. It is not possible to raise any crops on the west side of the river down by his house. I knew this place in 1908. At that time a man squatted in there, but if I remember right, he was serving a term in the Deer Lodge Penitentiary. At that time there was an old trail there that was passable under conditions, going across the entire 120 acres that was

(Testimony of Al. Dixon.)

used by the public in going from the northwest corner of what is now the Fifer Homestead to the point of the river where this house is. It was an old trail down there, [58—28] and you could ford the river at that point. At that time in 1908, the ford was not at this Fifer place where you cross the river to go to Sand Springs, but possibly a third to a half a mile down at the other point.

Redirect Examination by Mr. FORD.

The WITNESS.—As near as I can remember, the ford at the Fifer place, at his buildings, was constructed, or I used that first myself in about 1911. The road was down at the other crossing, down the river. In 1919 when the Franz Corporation began its operations on the Fifer place, the main traveled highway that was used by the public at the time was right up in front of his house along the river bank. I guess the point indicated by your pencil is approximately it. It came right in there by his corner and cut across his land, right around his river bank and up through there. That is the main traveled highway. There was a dim trail that used to be used up through there. It was used as a public highway in 1919, off and on, if a man wanted to go that way. There was a gate there to keep it shut. The character of that Charles tract that was sold some nine years ago down by Mosby, a small portion of it was made soil, and the biggest portion of it was rough, high ground; no portion of it was irrigated.

Witness excused.

Testimony of L. E. Routin, for Plaintiff.

L. E. ROUTIN, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. FORD.

The WITNESS.—My name is L. E. Routin. I live on the Mussellshell River about two miles north of Mosby. I am farming and stock-raising. My land is situated about two miles south and one mile east of the Fifer tract of land. I grow alfalfa on my place, but it is not irrigated. It is dry. I have known the Fifer tract of land for about sixteen years. At the time Mr. Fifer filed on this land in 1913 or 1914, it was covered with [59—29] cottonwood timber, greasewood, dead cottonwoods, rose briars, driftwood from this coulee. It has been cleared out since. I have cleared about twenty-five or thirty acres, in that kind of work.

Q. What would it cost to clear that forty-acre tract?

Mr. MARSHALL.—We will object upon the ground and reason it is incompetent, irrelevant and immaterial.

The COURT.—I think so.

Mr. FORD.—I think it goes something to the value of the property.

The COURT.—Oh, no; if he has knowledge of the value of the land after it was cleared, that is the value. The objection will be sustained.

The WITNESS.—The fences around the Fifer tract of land in 1919 at the time the Franz people

(Testimony of L. E. Routin.)

came in there were good. They were built of cedar posts and four galvanized wires. I should judge the posts were about twenty feet apart. There were some cross fences; there was one a little bit west from the west line of the east forty running across for a quarter of a mile to the south line of that forty, and then turned and went down the river and leaving an outlet back up into these upper forties. It extended across there you might say a quarter of a mile outside of a line wide enough to drive a wagon or a team through, or what a man would naturally want for an outlet from his buildings. I don't know how long the other fence was; I never measured it, but it was almost a quarter of a mile long. I know how Mr. Fifer irrigated his place. He went to work and cleaned up this piece of land and cleaned the coulee out away back up clear across his place and kept it so the water would keep on down until it got on to his certain piece of land that he wanted to irrigate; then he went to work and dug the ditches and ran laterals out. I believe he built a dam where this cross fence was, near there, I believe it was right at [60—30] the fence. His system of ditches and laterals would probably irrigate better than three-fourths of his meadow, on the east forty, starting in from the northwest corner of forty; it would irrigate probably thirty acres or thirty-five out of the forty. I was acquainted with the small tract of land across the river. It was in alfalfa. In 1920, the general conditions there with reference to moisture in that

(Testimony of L. E. Routin.)

vicinity were fairly good. On this tract of land across the river, considering general conditions, that character of land, practically every year since I have been in the state of Montana, will cut three crops of alfalfa. It would usually start in at about two or two and a half tons to the acre, and dwindle down to a ton and possibly a little less at the last cutting. The big cutting is the first crop. The south forty laid in between the hills practically level; you might say it drains from the foot of those hills into the center of the forty from both ways, that is, it kind of cups down in, but practically, you might say, level; what a person would call practically level. I know that he built a ditch on the west side of that forty, coming out of a coulee there at the corner of the forty, for the purpose of distributing flood waters over that land. I know that in the fall of 1920 he sowed it to sweet clover. That kind of land put into sweet clover will usually cut somewhere from a ton to a ton and a half, possibly two tons to an acre. In 1921 the moisture conditions were about the same as the year before. Under ordinary conditions, that east forty, the bottom land, I don't believe that I ever saw it cut less than from thirty-five to forty-five tons. I knew it to cut forty-five tons. It usually ran from thirty-five to forty-five tons every year. On that tract east of the river in 1921, I should judge you would get during the season—I don't know how many acres there are over there—ten or fifteen—I suppose possibly three or four

(Testimony of L. E. Routin.)

tons to the acre during the season, the three cuttings. Considering the conditions that existed in [61—31] 1921 with reference to this thirty acres of sweet clover in the south forty, in my judgment, that sweet clover usually cuts most any year from a ton to two tons per acre on that character of land; that is, after the first crop. I said a while ago that in 1920 it would have produced a ton to a ton and a half per acre. The reason it was producing more in 1921 than in 1920 was it always gets better after the first year. Last year, in 1922, the general moisture conditions in that vicinity were pretty good. Considering the conditions that existed last year, this bottom land of blue joint would have produced—it will always produce a ton and a half to the acre, possibly cut four or five tons most any year, and I think it would have produced that in 1922. With reference to the small tract across the river, in the year 1922 I think that would have produced three to four tons, any year. That south forty, for the year 1922, I should judge it would produce as much as any other year. I said it would run any year from a ton to two tons per acre. I think it would have produced that in 1922 on that character of land. The market price of hay in that country in the fall of 1920 in the stack was fifteen dollars a ton. The price of alfalfa and clover in that vicinity in the fall of 1921 in the stack, alfalfa was twenty-five dollars and clover was twenty dollars; the market price of blue joint hay in that country in the stack was from thirty to forty dollars. The market price

(Testimony of L. E. Routin.)

of alfalfa in that community in the fall of 1922 was twenty dollars; sweet clover was fifteen dollars, and blue joint hay was—I can't say that I know of any blue joint hay selling last year at all, but I never knew in the last ten years of good blue joint hay selling for less than twenty-five dollars. I would take one ton of blue joint hay any time in preference to two of alfalfa. Blue joint hay is always worth approximately twice as much as alfalfa. During the years of 1920, 1921 and 1922, in my judgment, the reasonable value of the [62—32] pasturage upon the Fifer tract per year would have been one hundred dollars. I think I know the values in this vicinity and the vicinity of the Fifer tract of land.

Q. What in your judgment, Mr. Routin, was the value of the Fifer tract of land prior to the entry of the Franz corporation?

Mr. MARSHALL.—We will object to that upon the ground and for the reason the proper foundation has not been laid, this witness testifying he thinks he knows the valuation.

The COURT.—Not shown to be qualified; objection sustained.

The WITNESS.—That opinion is based upon offers that I have seen made and by myself, the price that I have been offered for my land, and with that information I would judge that I know the value of the land.

Q. Then what, in your judgment, was the value

(Testimony of L. E. Routin.)

of this land at the time of the entry of The Franz Corporation?

Mr. MARSHALL.—The same objection.

The COURT.—Any sales made around there in recent years of like lands?

A. Not any in less than eight years I don't believe that I can think of.

The COURT.—You have land of your own?

A. Yes, sir.

The COURT.—Farming it? A. Yes.

The COURT.—Know what this land produces?

A. Of Mr. Fifer's?

The COURT.—Yes.

A. Yes, sir.

The COURT.—Does that enter into your method of calculating the value? A. Not exactly, no, sir.

The COURT.—Only would express an opinion.

Q. In considering the value of the Fifer tract, do you consider the crops that it is capable of producing?

A. That is the way I would place valuation on any land. [63—33]

Q. That is the way you place valuation on any land? A. Yes, sir.

Mr. FORD.—I don't think he understood your Honor's question.

The COURT.—Perhaps not. Proceed.

Q. What in your judgment, Mr. Routin, was the value of the Fifer tract at the time of the entry of the Frantz Corporation?

(Testimony of L. E. Routin.)

Mr. MARSHALL.—We will object upon the ground and for the reason the witness is not qualified and not a proper proof of damage in an action of this nature under the pleadings in this case.

The COURT.—This witness farms in this locality, knows the products of land, and upon that he says now he places his judgment of value. All owners have some idea of values. How much weight will be given to it is for the jury. Overruled. Whereupon the defendant then and there duly excepted to the ruling of the Court.

The WITNESS.—Five thousand dollars. The value of the land after the entry of the Franz people and the building of these roads and the general condition that now prevails there at the present time it is absolutely worthless so far as value is concerned to the surface. It has no value whatever. I am familiar with the cost of building fences in that locality. I have never figured it up as a whole, but the wire would cost \$5.50 a hundred at the railroad, thirty miles from there. It would be worth \$6.25 on the river. The cedar posts on the river would cost about 20 cents apiece. It would cost ten cents apiece to dig the post holes and cut the posts. I couldn't say what it would cost to string the wire.

Cross-examination.

(By Mr. MARSHALL.)

The WITNESS.—I couldn't say how many crops of alfalfa were [64—34] cut off this Fifer field in 1918, nor how many crops were cut off of the

(Testimony of L. E. Routin.)

meadow during that year. I don't say that I know how many crops were taken off the alfalfa, off of the meadow in 1919. I suppose the yield would naturally depend on the number of crops cut. The alfalfa on the other side of the river was not irrigated during the year 1919; never has been. I have no idea how many cuttings were taken off of it in 1919. That piece across the river is not irrigated. There was one crop taken from the meadow land during 1920. I think the meadow land produced about 45 tons during the year 1920. I estimate there are about 30 or 35 acres in that meadow land, and about 5 to 6 or 7 acres in alfalfa; I never measured it. I never measured the sweet clover, but there must be about thirty acres in that. I didn't know there was a public highway on this place, but I know where the graded road is through there. I said I estimate the value of that property before the Franz people entered upon it during the year 1919, to be \$5000.00, right around \$30.00 an acre. The meadow land and the alfalfa land is worth more than the balance of the land. This land is about thirty miles from market. This place, the entire acreage of 160 acres on the flat; it is not in the breaks of the Musselshell River. I know where the Fifer place is, and practically every bit of it is all down on the flat of the Musselshell River.

Witness excused.

Testimony of Charles W. Sandridge, for Plaintiff.

Whereupon CHARLES W. SANDRIDGE, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. FORD.

The WITNESS.—My name is Charles W. Sandridge. I live at Lewistown, Montana. In the fall of 1919 I was down on the Musselshell river at my brother-in-law's. I was employed by the Franz Corporation in the spring of 1920. At that time I was driving a team, and I am acquainted with the Fifer tract of land by crossing over it. We hauled supplies and freight over the Fifer place in [65—35] the spring of 1920. I know where the patch of clover is located on the south side of the place. I was down there about three months, and during that time there was range stock in the place, and after it began to get a little dry we turned the horses out nights used by the Franz Corporation, and they would pasture around in there and up on top of the hill, and range stock likewise pastured in there.

Cross-examination by Mr. MARSHALL.

The WITNESS.—At the time I worked for the Franz people hauling materials back and across this place, there was a gang helped fix the fence up once or twice, I believe.

Q. What were your instructions with reference to passing over this acreage?

(Testimony of Charles W. Sandridge.)

Mr. FORD.—Objected to, irrelevant and immaterial.

The COURT.—Sustained.

Whereupon the defendant then and there duly excepted to the ruling of the Court.

Witness excused.

Testimony of Frank Fifer, for Plaintiff.

Whereupon FRANK FIFER, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. CHOATE:

The WITNESS.—My name is Frank Fifer. I am a brother of the plaintiff in this case. I am familiar with the land owned by my brother, and have known it for about five years. In the year 1921 I was out on my brother's ranch. I got out there in the neighborhood of the 25th day of May; I can't give you the exact date, of 1921. I stayed there right along until after the first of August. During that time I put in a garden, fixed some fence, and helped harvest. I had very poor success in attempting to raise a garden; I didn't get any to speak of. The reason I did not get a garden was on account of the cattle getting in there and eating it up about the time it [66—36] would do any good. During the time I was there I fastened up the wire, and I set some posts, and put in stakes between the posts to keep the cattle from crowding through the wire, crawling through, but I was not able to keep the fence in such condition of repair as to turn the stock and keep them out of the prem-

(Testimony of Frank Fifer.)

ises. The general condition of those fences in the year 1921 while I was there was bad over all portions of the land. They were down in several places. The range cattle came on to the premises during that time. There were no crops of hay produced on the premises that year because the cattle ate up what was there, and what the oil didn't kill the cattle got.

Witness excused.

**Testimony of E. J. Fifer, in His Own Behalf
(Recalled).**

Whereupon E. J. FIFER, the plaintiff herein, recalled as a witness for and on his own behalf, testified as follows:

Direct Examination by Mr. FORD.

The WITNESS.—I would judge that it cost fifty dollars a year to irrigate the tract of land that I had under irrigation, the forty acres; that is, keeping up the ditches, laterals and attention and water.

Cross-examination by Mr. MARSHALL.

The WITNESS.—That would be for the irrigating season, along up to August, from the spring of the year. I would have to keep the ditches open, according to the amount of trash and stuff that flowed in down on me; it varied so much; sometimes it would run a whole lot, and sometimes quite a bit more.

Witness excused.

Mr. CHOATE.—The plaintiff at this time asks leave of Court to amend his pleading to conform to

the proof in the following particulars: To amend line 25 of section 12 of the Complaint by inserting, instead of the words and figures five hundred dollars (\$500.00) the words and figures "twelve hundred dollars (\$1200.00)," making the sentence read "that the damage to plaintiff's fences by reason of [67—37] the entry aforesaid was and is the sum of twelve hundred dollars (\$1200.00)."

Also for leave to amend line 31 of the same section 12 by inserting, in lieu of the figures \$2,000.00 the figures "\$4,000.00," making the sentence read "that the damage to plaintiff's said land by reason of the entry of the defendant aforesaid was and is of the value of \$4,000.00."

We make that offer to make the pleadings conform to the proof.

The COURT.—It may be done.

The plaintiff rests.

DEFENDANT'S CASE.

Testimony of Carl C. Adams, for Defendant.

Whereupon CARL C. ADAMS, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. BROWN.

The WITNESS.—My name is Carl C. Adams, and my business is that of a civil engineer. I made a survey and measurement of the lands involved in this controversy, known as the Fifer ranch; I did that under the direction of counsel. I took the

(Testimony of Carl C. Adams.)

exact measurements and locations of various areas and territories, and from those measurements, surveys, and locations, the plat which you have in your hand is the plane-table sheet which I used in making that survey. That plat substantially shows the territory in question with the permanent objects located thereon, and was made from exact measurements.

Said plat was thereupon offered in evidence as Exhibit Number 5 for the defendant, and admitted without objection.

The WITNESS.—The system of tinting the different areas on the plat there corresponds with the system of tinting of the legend on the plat, and designates the character of land. The pipe-lines, roadways, drainage ditches, drainage ponds or irrigation ponds are all located and marked as such on the plat. I have no location of [68—38] the telephone line, and as to the ponds I should not call them irrigation ponds, for the reason that they are settling ponds to separate the pumpage water from the oil wells from such line as may be used. In the east forty, in the so-called meadow that has been under controversy here, from my measurements there are two cultivated tracts of land there which total 5.53 acres; there are three tracts of sod or meadow land which total 11.84 acres, making a total of 17.37 acres. I also measured the tract known as the garden tracts there, and they are included in the first part of my statement. Those area measurements are carried on to the map and inserted

(Testimony of Carl C. Adams.)

there. The camp and tanks and pumping stations, are all also shown and indicated on the map there; the camps on the premises; the Charles camp is not definitely located. That is a camp that is off the premises.

Cross-examination by Mr. FORD.

The WITNESS.—I said my business was that of a civil engineer, and I am following my profession at the present time. I am also statistician of the Montana Oil & Gas Association. The Franz Corporation is a member of that association. This plat shows the total number of acres in the so-called east forty west of the river, with the exception of that portion which is covered by timber, tinted yellow; I made no attempt to determine that for the reason that it was not under cultivation, or could not be under cultivation. I do not know as a matter of fact that that entire tract where there are a few cottonwood trees was in timothy and alfalfa. That is not in accord with my impression at the time I was there. It looked like the ordinary underbrush of a cottonwood timbered area. I mean by underbrush the rose-bush and willows on the first bench. The willows and rose-bushes were not so very high. In the vicinity of the buildings there it was cleared off, but I didn't get the impression that the tract of land which has cottonwood trees growing on it has been cleared and farmed, either broken up or farmed as meadow. There are approximately 25 acres included in that forty-acre tract west of the river, on the [69—39] east

(Testimony of Carl C. Adams.)

forty. I did not go across the river on the survey, and the right or easterly bank of the river as designated on the plat was estimated by me. I saw no cultivated land over there, and for that reason did not attempt to extend my actual survey on that side of the river. The yellow indicates a timbered area. I saw from across the river that cottonwood trees such as one would ordinarily find were growing there, on this tract across the river in this east forty. I couldn't tell whether it had ever been cultivated. It may have been in cultivation at some time. I did not measure the width of the river, but at its present stage I estimated it to be an average width of 200 feet. That is an estimate. At ordinary stages, it is considerably narrower than that in some places, but the river is rather high just now.

Witness excused.

Mr. BROWN.—We may be able to stipulate as to the next witness: The photographs that will now be identified and located as to location and direction upon the map, Defendant's Exhibit 5, may be located and their direction given by witness Marshall without objection as to his later participating in any manner in the case, subject to the objection as to the time of their taking.

Testimony of Charles J. Marshall, for Defendant.

Whereupon CHARLES J. MARSHALL, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. BROWN.

The WITNESS.—These photographs that have just been stipulated to were taken three days ago under my direction.

Picture 1, which is marked “Exhibit 4 for Defendant,” was taken in the northeast corner of the northeast corner, about 20 feet from the extreme corner, and is a panorama view looking due south showing the eastern fence of the Fifer tract.

No. 2, which is now marked Exhibit 3 for the defendant, was taken approximately at that point looking towards the buildings on the Fifer claim. [70—40]

Picture No. 4, which is marked as Exhibit No. 6 for the Defendant, was taken six feet south of No. 2, Exhibit No. 3, and is a panorama view looking across the garden towards the pump-house and the tanks of the Franz Corporation.

Exhibit No. 7, picture No. 4, is taken at a point 220 feet from the south boundary line of the Fifer claim and directly on the raise west of Fifer No. 2 well, looking due west.

Exhibit No. 8 is a photograph taken about 10 feet from the boundary line between the school section and the Fifer claim and at about the quarter corner common, on the raise, a panorama view looking

(Testimony of Charles J. Marshall.)

over the garden spot and the meadows of E. J. Fifer, including the stable and the power-plant of the defendant. If you wanted to look over the portion of the ranch which is known as the meadow, as it exists to-day, you could take Exhibit No. 3, which would show the houses, Exhibit No. 6, which would show across the garden, and Exhibit No. 8, which would show back against the other two views, and could see the entire tract with the exception of this corner across the river.

Exhibit No. 9 is a view from this point at 280 feet. That is, 280 feet south of the location of the camera for No. 8. That was looking due west along the section line between the school section and the Fifer claim.

Exhibit No. 10 is a view taken from the public road near the center of the northwest quarter of the northwest quarter of section 21 in Township 15, looking northwesterly between the Fifer No. 1 and the Montecal-Fifer No. 1.

Exhibit No. 11 is taken 220 feet north of the section corner common to the southeast quarter of the northeast quarter of Section 20, and the northeast quarter of the northeast quarter Section 20, looking southwesterly across the southeast quarter of the northeast quarter of Section 20; that is, looking southwest; looking across the quarter which in this lawsuit has been commonly referred [71—41] to as the south quarter.

Exhibit No. 12 is a picture taken from a point 220 feet in from the corner upon which No. 11 is

(Testimony of Charles J. Marshall.)

based, 220 feet in, 220 feet north, looking across this section of this map. That is, looking across this same south section, but looking directly south.

Exhibit No. 13 is a picture taken 220 feet from this corner looking northeasterly across the south-east quarter of the southeast quarter of Section 20.

Exhibit No. 14 is a picture taken from the road directly east and somewhat north of the cabin shown in the northeast quarter of the northeast quarter of Section 20, being a panorama view down the public road as designated there toward the Fifer buildings and toward the river.

Exhibit No. 14 would give you a panorama view of almost his entire tract, with the exception of what is known as the south forty, as you would approach the ranch from the common highway.

Exhibit No. 15 is taken in this portion, about 100 feet from the public highway, where it enters upon the Fifer tract, looking due east, the picture showing the line fence between the school section and the Fifer tract.

Mr. BROWN.—We offer the photographs which have been thus identified and located on Exhibit No. 5 in evidence.

Mr. FORD.—To which the plaintiff objects on the ground that there is no testimony showing that the same condition existed at the time the pictures were taken and the time the injuries complained of were committed; therefore incompetent, irrelevant and immaterial.

The COURT.—There may be some force to that objection.

(Testimony of Charles J. Marshall.)

Mr. BROWN.—We expect to connect it up.

The COURT.—Very well, if you promise to make the connection they will be received. [72—42]

Mr. BROWN.—I promise to make the connection.

The COURT.—The objection is overruled, and if not connected up ruling will be made accordingly.

Witness excused.

Testimony of L. S. Landz, for Defendant.

Whereupon L. S. LANDZ, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. BROWN.)

The WITNESS.—My name is L. S. Landz. My business is oil production superintendent. I was employed in the vicinity of the Fifer tract in the Cat Creek field in 1919, 1920 and 1921. I went there on the 20th day of October, 1919, and stayed until September 1921. A Mr. Sontag succeeded me. I am familiar with the general view of the ground and the character of it, as I went there in 1919; also familiar with it when I left there in 1921. I can identify Exhibits Nos. 3, 4, 7, 9, 10, 11, 12, 13 and 15 as showing the ground and lands in the same condition, except for permanent structures, as I knew it during the times I was there. On Exhibit No. 14 I can identify the ground and other conditions as being the same, with the exception of the road, and these buildings were constructed, and these tanks were set after I went there. Out-

(Testimony of L. S. Landz.)

side of that it is the same, with the exception, I believe, that plowed ground is a little different from the way it was when I first went there.

Exhibit No. 6 has structures in it that were not there when I went there, consisting of the pump-house and tanks, and there is more plowing showing than when I was there.

Exhibit No. 8, except for the additional pump-house over in the corner and more plowed ground, is the same as when I was first there. When I first went to the field in 1919 I was employed as superintendent of field work. When I first went to the field, I entered the Fifer lands, referring to Exhibit No. 5, on the north line near Mr. Fifer's house; we then crossed the river at the crossing just in front of Mr. [73—43] Fifer's house, and then we recrossed the river and went south practically following the river on an old trail which led south of Mr. O'Day's farm through the Charles farm, which is directly south of that. The Charles tract is directly south of the Fifer land, and the O'Day place is still further south. We first conducted our operations in there on the Charles tract. In taking up the operations it was necessary to haul in heavy machinery and timber to do the drilling. When we started moving in the machinery and drilling apparatus, we entered the Fifer tract near the northwest corner of his tract, following an old trail. That was near the location of photograph No. 15. We then took a course which is practically the same as the road which is marked

(Testimony of L. S. Landz.)

on that map as a highway. At the time we entered first and at the time we entered later to take up this work Mr. Fifer and everyone else was very pleased to have us there, and I had no kick whatever from any of them on our crossing the land or using it. He had some gates and we endeavored to keep those gates closed. On the 19th of February, just as soon as we had completed the No. 1 well on the Charles, which is practically 1100 feet south of Mr. Fifer's line, and it became known that we had oil, of course, there was a rush, and in those operations, and the rush, the roadway we are now using was used in going in; that is the same road that was indicated in a southerly course across the Fifer tract. There was also a stampede to the east and they used that roadway, and a roadway that came into Mr. Fifer's house to the south, the road indicated on here as the Weaver Trail. The first drilling we started on the Fifer tract was the No. 1 Fifer in the spring of 1921, it was spudded in. That is the location the engineer gave as Franz-Fifer No. 1. To get to the Franz-Fifer No. 1 from the roadway it was necessary to put in another roadway and a bridge crossing a coulee. That road is the roadway used exclusively in the development of the Franz-Fifer No. 1. That road was used exclusively by the Franz people first in that development, and not used by the general rush. In building that road, the reason [74—44] we didn't go directly across from the westerly or directly north from the southerly and immediately

(Testimony of L. S. Landz.)

below it, because it is rough country. That is indicated by the dark line on the map there and there is a nasty shale hill just across that coulee. We had to go lower down that coulee in order to cross it, to pull a decent load to this location. There were other short roads made from that vicinity and also to the road to the Montacal-Fifer No. 1, and they were used exclusively by the Montacal for the purposes of moving material, tanks and equipment, and for the handling of the production on the Fifer tract, and for no other purpose. Just before I left there, we constructed a road into the pump station which we built, which Mr. Fifer admitted. We made that road there from the main road over to the pump-house. At that time there was no old road from the pump-house on that connection, going up to Weaver's. The road which went up to Weaver's was this other road, the other line of which following the river, and Mr. Fifer had a fence built near the river bank. The road was outside of the fence. The purpose of building that road from the main highway over to the pump-house was for moving material to build the pump-house, to pump the oil and water from the John O'Day water well to different operations in the field. It was necessary to pump water in the Fifer tract to develop the Montacal and Fifer wells. At first it was used for drilling, and afterwards for the purpose of producing oil, power purposes. It was necessary to bring in water to the Fifer tract for this development. The pump-house was

(Testimony of L. S. Landz.)

also put in for the purpose of handling oil. With reference to the Fifer tract, we pumped the oil produced on the Charles and Brown tracts, and also for the Montacal on Mr. Fifer's farm, and Tip O'Neill and all other operations which were under the river bluff or under the hill. Assuming that we had but the one lease and eliminating the Brown and Charles and others, it would have been necessary for us to have installed the pump to have handled the Fifer in the manner in which we did. There is no additional installation by [75—45] reason of other traffic going through to other places. It would require the same installation to pump 100 barrels as it would 10,000. That would be necessary for the development of the Fifer. The water installation could be a different installation; it is a high pressure pump that we use, and we could use a low pressure pump on Mr. Fifer's farm for all wells that we drilled on it. The water line installation is carried to an average depth of five feet; we laid the oil line right over the surface, but so far as the water line is concerned, it does not interfere with using the surface for farming purposes at all. The oil lines are laid on the surface and they would be just the same relative to Fifer whether we had Fifer alone or O'Neill and Brown and Charles in them. To indicate where the pipe-line comes from Fifer No. 1, Montacal-Fifer No. 1 and 2, and the other Fifer wells, how it gets down to the pumping plant, I wouldn't be positive that the lines are the same now as when

(Testimony of L. S. Landz.)

I left there in 1921, but at that time our gathering lines, we had a gravity system and we followed as near as we could down this coulee so that we could keep our line just as nearly level as possible to get gravity to the pumping station on Mr. Fifer's farm. When we gathered the oil we pumped it from there to our main pumping-plant, which I believe is on section 13, about four and one-half miles west, and from there on to Winnett, about twenty and one-half miles. The gravity line, which was placed above the surface, from the time it entered Mr. Fifer's meadow over to the pump-house, it is on land which is practically level, a part of his meadow, from the mouth of the coulee, down to the edge of the foothill above the meadow, and then where it crosses to the pump-house there, that ground is meadow. I couldn't say what part of the gathering line on the Fifer place was within the coulee. I didn't lay the lines; I didn't have charge of that branch of the work. Mr. Sontag had charge of that. The pumping station and power-house was an essential part of the development on the Fifer lease, if we had had no other, and would be [76—47] necessary to the taking of the oil out and getting it to the delivery point, and the same would be true of the water lines with this respect, we could have put in a different system of pumping water, a low pressure system to distribute over Mr. Fifer's farm, where we had a high pressure in; but the size of the line would have been the same, and it would have been buried

(Testimony of L. S. Landz.)

just the same. There is a telephone line through here also that is used in connection with the pipeline system, in case we get a line broke or a leak or anything like that, that we can stop the pumps. The telephone was not necessary to reach the wells on the Fifer land, but to the power plant, which we use in handling the oil to the main pumping station from that field. At the time we went in there first, before the stampede started, there were gates around the Fifer place, and we did not have to break the wires to get in or out. [77—48]

The roadway we entered upon and used looked like an old trail, more like an old cattle trail than a distinctly marked road. It was used all the time we were working, and I drove over the trail once before we started in company with Mr. Leavitt. The gates at either end of this field were kept closed, so far as the Franz Corporation and its operations were concerned, until the stampede came. When that happened, they were down. There were a large number of operators and a large number of people going through there at that time, but so far as the Franz operations were concerned, they were kept closed; we built them on two or three occasions. There were two gates that we went through in coming on the land originally; one located where we came on to Mr. Fifer's farm, and the other just north of our camp which we established on the Charles. The camp on the Charles tract was used for the development of the Fifer lease as well, and the so-called south gate

(Testimony of L. S. Landz.)

was the gate leading from Fifer's land to that. We also used the Weaver road which came to Mr. Fifer's house and followed the Musselshell River in a southerly direction. I drove through Mr. Fifer's corral, or rather by his corral, in using that road, and at Mr. Fifer's invitation. The first time I came through there, Mr. Fifer opened the gates. There were no other graded roads in that vicinity or any other roads used by the Franz Corporation than the ones that have been indicated, the one to the Fifer well and the one to the pump-house. It was our practice in handling heavy machinery and trucks to go in and follow defined roadways as near as possible. We did that in an effort to cut down the loss to the property owners. There were times when we were unable to follow those, in the spring of 1920 when the road was impassable from rains. At those times we probably deviated about one hundred feet away from the main roadway, getting back to the main roadway just as soon as it was possible to do so. On the map there is a line of roadway showing as wagon track that goes over southwesterly; that was first used by [78—49] the Burke Oil Company, which is now under the direction of the Franz Company, and they used it continuously for drilling a well, taking in the materials and establishing the camps. It was also used by the Williams Syndicate and Lucky Lucile. That was for drilling wells on Mr. Fifer's farm. That was the Lucky Lucile, shown on the south forty; they used practically the road

(Testimony of L. S. Landz.)

as marked on the map, this main road down and then across. That roadway was not used by the Franz or under its direction or by any of its employees. The Montacal also had two wells on the Fifer tract, in the northwest forty, offsetting the center forty on the north line. In the development of the drilling, carrying in supplies to these wells and taking oil from them, it was again the development of the Fifer lease. Taking the oil from them and furnishing the oil and water to them was through these oil-lines and water-lines heretofore designated, and through the pump station of the Franz Corporation which has been heretofore referred to.

Cross-examination by Mr. FORD.

The WITNESS.—I first went to the Cat Creek in October, 1919, and the first operations were started, moving materials on the twenty-first day of November, 1919. At that time our operations were carried on on the Charles farm. I believe we drilled three wells in this locality before starting to drill on the Fifer tract. We drilled two Charles wells, the O'Day well, and had started operations across the river, for three wells too. The work of hauling material back and forth to those six wells, three across the river and three south of the Fifer tract was not hauled through the Fifer tract. During the high water and bad roads we hauled through Mosby. It was impossible for us to cross the river until about June with the loads of material, and we had to use the bridge

(Testimony of L. S. Landz.)

at Mosby. The trail at the northwest corner that was mentioned heretofore was not really a road; it was traveled some, but it was strictly a trail. [79—50] There was also a trail to the east of Fifer's place and up through section 16. The power stations and the pipe-lines were built on Fifer's tract in 1921, in the summer. In the fall and winter of 1919 and 1920, we used wood for fuel in drilling the Franz-Charles wells.

Q. And where was it obtained from?

A. From the school section.

Mr. MARSHALL.—We object to that as immaterial. No damage claimed for wood.

Q. You also obtained some wood to the west of the Fifer tract, didn't you, Mr. Landz?

A. I don't know the exact location; Mr. Miller, I gave him a contract to furnish this wood at so much a cord at the well and he paid for the wood and hauled it to the well.

Q. Wasn't some of the wood hauled from the west of the Fifer tract?

Mr. MARSHALL.—We object to that, immaterial, because shown to be an independent contractor.

The COURT.—That might be a defense in some circumstances, but if he necessarily had to go through this land, then again the question of damage. He may answer. Overruled.

Whereupon the defendant then and there duly excepted to the ruling of the Court.

(Testimony of L. S. Landz.)

The WITNESS.—He got this wood different places, but I don't know the location except on the school section. I know that during the time that we were drilling the Charles and O'Day wells that the fence on Mr. Fifer's land on the west end and on the south side was down in a number of places, left down for the purpose of crossing over the land, and the fence on the south side, immediately surrounding our operations on the Charles lease, was practically destroyed; that is, on the north of the Charles and south line of Mr. Fifer's tract, practically half a mile, was destroyed. At one time I had forty teams hauling material back and forth. The most [80—51] of those teams went in on this other road and came down by Mr. Fifer's house. I do not mean to say all of those teams went through the gate, and when the teamsters did go through the gates they were not always closed; we closed them and watched them and tried to keep them closed, but it was impossible to do it. During the spring when the roads were bad, we got through there the best way we could. If we could keep on the road, we did, but if it was necessary to take down a fence to get through, we did that. As I remember, the principal part of the hauling we did, when we started hauling for Mr. Fifer, was about May, and the roads were very soft at that time and we did drive through his field; we couldn't get through on the road in many instances. I remember that during the summer of 1920 Mr. Fifer had trouble with stock on

(Testimony of L. S. Landz.)

his pasture. The horses that were used by the Franz Corporation were pastured more on Mr. Charles' land than on Mr. Fifer's. Some of the horses would get over on to the Fifer land. The fence that separated the Charles tract from the Fifer land was practically destroyed, though he had a very good fence around his meadow at that time.

There were other roads leading off from this public road, the main road; we had constructed a road to drill Fifer No. 1 and Fifer No. 2, and over to the pump-house, and there was a road which lead to the camp and one which we constructed that lead up the river to Mr. O'Day's. We commenced drilling on the Franz-Fifer No. 1 well along in the spring of 1921, as I remember it. I think it was along in May or June that the Franz-Fifer No. 1 was drilled in. I don't remember what the well made when it came in. The water used for drilling the Franz-Fifer No. 1 when it was drilled, was a gravity line from the O'Day well; the pumping station was not used in connection with the pumping of water for the Franz-Fifer No. 1, for the drilling. I don't remember what the Franz-Fifer made when it was brought in; I think about a 75 barrel well, although I don't [81—52] remember exactly.

Q. Do you know what it made in settled production?

Mr. BROWN.—I object to that, "in settled production."

(Testimony of L. S. Landz.)

The COURT.—It is cross-examination; it might be material.

Exception noted.

The WITNESS.—I don't think there is any settled production in that field. The well keeps going down from the time you drill it; but the proposition, I guess, it might stop at a settled point and stay there. I don't remember how long this well made 75 barrels. I am not sure that it did, but my recollection is that when I first completed it, that the well made about 75 barrels. We commenced drilling the No. 2 well in June, I believe, of 1921. It produced two or three barrels. I wasn't there very much after that, but the well was very light to start with. The first pumping, as I remember, we got $7\frac{1}{2}$ barrels from it, but it soon settled down, and when I left they were getting two or three barrels. I believe they were getting 25 or 30 barrels from the Franz-Fifer No. 1. I don't know what it is making now. We ran a line over from the water-line which we had laid into the No. 2 Charles, to obtain the water for the purpose of drilling the Franz-Fifer No. 2. That was a gravity system, from the head flow of the O'Day well. The water from the pumping station was not used for the Franz-Fifer No. 2. It is a fact that the pumping station and the construction of the main lines for water purposes were not constructed there for the purpose of drilling wells. Had we known the production would have been as small as it is, there probably wouldn't have been

(Testimony of L. S. Landz.)

any power station built on the Fifer tract at all. I think this power station would have been constructed for the purpose of taking care of the Fifer production; we would never have built the pump had we known the wells had went off the way they do. It has been a losing proposition, so far as pumping oil, to us. I think we would have constructed this pumping station for the production of the Fifer wells alone. It [82—53] would take just as large a station to pump 100 barrels a day as it would to pump a thousand barrels a day. It is a case of pressure to shove that oil over the hill. The oil station and the water station were both built together. I don't remember which was used first. You have to have just as large equipment for the purpose of pumping oil alone as you would for both oil and water; it is exactly the same equipment for pumping water and for pumping oil; it is two engines and two pumps; one pumps oil and one pumps water; standing side by side. I don't know how long it has been since there has been any operation or drilling on the Fifer tract by the Franz people; I haven't been there for nearly two years. I left there in September 1921 and I haven't been there since. I mentioned a road being used by the Lucky Lucile and the Burke and by the Williams Syndicate, but I don't think that is all one and the same operation. Burke drilled a well right over west of Mr. Fifer's land. The Williams Syndicate drilled in the south forty of Mr. Fifer. I don't

(Testimony of L. S. Landz.)

know whether that is the same point as the Lucky Lucile or not. They change the names so often, that I don't know anything about it. The Williams Syndicate drilled south of Mr. Fifer, and I believe it was the Lucky Lucile drilled on Mr. Fifer's land. One was drilled with rotary and the other with cable tools. It might be that the well drilled with rotary was the Wharton Rose. The Lucile and Williams Syndicate may be one and the same outfit. I may have the names mixed, but I know these wells were drilled while I was there.

Redirect Examination by Mr. BROWN.

The WITNESS.—I had seven teams, fourteen horses there. We did not pay a rental or pasturage charge on those horses. The boy would turn them loose some of the nights down on the Charles farm. I did not know of their being turned loose on the Fifer tract. They weren't turned loose on the Fifer, but I know the boy has gone over on his tract to get them. [83—54]

They still use water there in the field for pumping. I don't know whether water is still being carried out to Fifer No. 1 and No. 2 and the Montacal. When we put our permanent lines in all these other lines were put in shape for winter; when we drilled the wells in summer, they were put in temporarily and afterwards put in permanently. I don't know what shape they were put in later, because I wasn't there. Water is used for pumping, after the drilling is finished, and it is

(Testimony of L. S. Landz.)

necessary to use it as long as the well is operated, and I think those wells are still being operated.

Q. You spoke about the number of teams that were hauling. What road did they use at first coming in?

Mr. FORD.—I object to that as repetition. The whole thing was gone into on direct examination.

The COURT.—I think so. The objection sustained.

The WITNESS.—I later built up and graded the public road coming from the northwest corner of the Fifer down toward the Fifer pump-house, and Mr. Fifer was there at the time and knew of it, and did not object or protest against it.

Q. Was that done to carry supplies to Fifer development?

Mr. FORD.—Objected to, repetition, leading and suggestive, improper redirect examination.

The COURT.—Sustained.

Q. Now, this hauling in, was that done by contract on a per pound basis or did you do the hauling yourself?

Mr. FORD.—Objected to, not redirect, and repetition.

The COURT.—Sustained.

Whereupon, the defendant then and there duly excepted to the ruling of the Court, and offered to show it was done by independent contractor.

Recross-examination by Mr. FORD.

The WITNESS.—I said that it was necessary to use water in [84—55] operating a well after it

(Testimony of L. S. Landz.)

has been brought in. Any water that is being used on the Franz-Fifer No. 1 well to-day is being used at the Brown well, which pumps it. Water is used at some other plant which is pumping it, if it is not being used right at the wells. They use a Fairbanks-Morse oil engine, but they don't generate gas with that, but we use water in the engine cooling system.

(Witness excused.)

Testimony of L. F. Sontag, for Defendant.

Whereupon, L. F. SONTAG, a witness called and sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. BROWN.

The WITNESS.—My name is L. F. Sontag. I am superintendent of pipe-lines and production for the Franz Corporation, Mutual Oil Company and several subsidiaries. I have operated in the Cat Creek field since the 24th day of September, 1920, and have been in touch with that field ever since that time. Since January first of this year I have been there at intervals; before that, continuously.

These photograph exhibits, Nos. 3 to 15 inclusive, except No. 5, I have seen, and there have been some improvements on that since I have been there the last time. I can identify all except No. 8 as being of the same character of ground and soil and appearance as when I first knew it, and No. 8 is different from when I first knew it. On No.

(Testimony of L. F. Sontag.)

8 there seems to be more plowed ground and it seems to be in a generally better condition than at any time that I have ever seen it.

Q. What is the difference in Exhibit No. 8 that you referred to from the condition it was in when you knew it and the condition the photograph now shows it to be?

Mr. FORD.—To which we object, incompetent, irrelevant and immaterial. He says the photograph does not show the conditions that existed there prior to the damage complained of. In what the difference is is an immaterial matter. [85—56]

The COURT.—Oh, these photographs are to show the general lay of the land; there may be differences in the way of buildings and the like. I think it may be shown for whatever light it may give the jury. Objection overruled.

The WITNESS.—At the time I seen this, that is, the last time I seen this, this land was under cultivation in garden truck, vegetables of all kinds, and it was irrigated by water furnished by the Franz Corporation.

The photograph exhibits, Nos. 3, 4, 6 to 15 inclusive, of the defendant, were thereupon offered and received in evidence without objection.

The WITNESS.—I have been in the business of oil development for thirty years, in practically all fields east of the Rocky Mountains and from Ohio, not including Illinois. I have had experience and practice in the installation and equipment of similar to that which is located upon the

(Testimony of L. F. Sontag.)

Fifer land. Taking up first the use of water in connection with the drilling operations on the Fifer land, the first use of water in drilling is for steam purposes; that is, to furnish steam to run machinery and for water to put in the hole to mix the drilling so that they can be baled out. That would be water for drilling purposes. After the well is completed and you are on to production, you still continue to use water for the purpose of pumping, sometimes by steam and sometimes by power plants which are operated by rods from a central station, which is run by an internal combustion engine and has to have water to cool with, and cleaning-out operations of wells at times after they have been used for maybe a year or so and the production has dropped. I don't know where the water was obtained from for the use on the Fifer tract, but when I first came there it was obtained from the O'Day well and conveyed to the Fifer tract by the pressure of the well, which was artesian in character, at times. At that time there was a flowage, and it was not [86—57] necessary to put in a pump. That flowage from the O'Day well was interrupted on two different occasions by a cave-in in the well and caused the company to put machinery upon it and clean it out so as to make it produce. This interruption in the service and the necessity of water on the Fifer tract for drilling purposes necessitated the installation of a pumping plant to handle the water situation on the Fifer tract. It is the practice, in

(Testimony of L. F. Sontag.)

the installation of a pumping plant for water, to install that in the same building or in the same premises as the pumping for the handling of the oil production, when both oil and water can be taken at the one unit, because it minimizes the expense; the same man that pumps oil can pump the water. That was the practice followed in the installation of the pumping house on the east forty of the Fifer tract. The additional reason for the installation of this pump-house near the river was that if the water supply should cease at the O'Day well, it could be taken from the river. At one time there were other water-lines across the Fifer tract that were used by other concerns and companies other than our own. The water-lines that were put in on the Fifer tract were put in below the surface, which would have no effect on the use of the surface for agricultural purposes. In connection with the use of this water, we put in one line up to the meadow ground of Fifer's, for the reason it was asked for by a tenant of the land for water for irrigation. It was used all last summer, and is yet, as I understand, from reports, I haven't been there. That irrigation pipe leaves the tank at the pump station, at the pump-house, and goes over to a ditch that was put in by the party on the ground, along the fence there, and irrigates practically the whole garden spot. When I first went on the ground on September 23d or 24th, 1920, I observed the general contour and location of the ground in a general way. When I first went there,

(Testimony of L. F. Sontag.)

I would be there every day for a week, and then maybe miss a day or two days and then back again. My continuous [87—58] acquaintanceship with that land continued until the first day of April, 1921. When I first went there, and up until last year, you couldn't tell that there was anybody living there; I never seen anybody around the place in driving by. This place was a meadow, and a part of it was plowed and part was not. The meadow part, during the time I knew it, was surrounded by an enclosure sufficient to keep stock out. There was some hay on it, was about all I noticed. It was later used for garden truck, enough to supply all the camps in the Cat Creek field with vegetables. That is, this forty. During the time that I first knew of it, when thus growing, I never noticed any range cattle on it, outside of maybe two or three head. Mr. Fifer never made any complaint of extensive trespassing with reference to that fact. Mr. Fifer's tenant was the one who made and handled the garden. Exhibit No. 6 gives a fair sample of the character of that growth as I knew it there on the ground; the vegetation of rhubarb in the foreground.

Moving westward, the area of ground that is bounded westerly and southerly on the plat by the public highway and on the north by the north boundary of Mr. Fifer's land, that triangular tract in that area, the road runs along the edge of a slope bearing to the ditch, and in places is eight feet higher, the road is eight feet higher than

(Testimony of L. F. Sontag.)

the land thirty to forty or fifty feet from the road, and gradually slopes from the road to this ditch, and cannot be crossed by team or wagon. That brownish marking on the plat there is the ditch itself. That ditch cannot be crossed back and forth in farm or oil operations. We had to put in the so-called Fifer No. 1 road practically to the lower end of it, to where the pasture land is, within a short distance of the pasture land, and when we went that far, we had to put in a bridge to get across it. The general character of the ground is sage-brush, cactus, drift brush that has been washed down by heavy rains, and there are holes [88—59] in it maybe two or three feet deep. It is just a natural washed ditch. Exhibit No. 9 purports to be a view across the area just described, and looking westerly, and describes the ground as it was during the time I worked there. That general sage-brush and cactus formation was never broken up or taken up at any time by the owner while I was there.

In Exhibit No. 10, which purports to be a view looking up toward the wells and up this coulee or ditch, there seems to be a little more sage-brush than there was. It was never broken or cultivated or had the appearance of grass during the time that I was there. I had no acquaintance with the south forty of the Fifer tract, only to look across it. I never had any occasion in my operations to cross it. It was never used in the operations, while I was there.

(Testimony of L. F. Sontag.)

With reference to Exhibits Nos. 11 and 12, I wouldn't like to say in regard to those conditions, as conditions were of no importance to me when I was there, and in that way I paid no attention only as barren land. That resembles it to a certain extent. I would hate to say to what extent.

Q. What was the character of the ground off to the southwest? Was it meadow? Was it prairie? Was it sage-brush and cactus, or was it timber?

Mr. FORD.—To which we object as the witness has said he paid no particular attention to it.

The COURT.—He said he looked over it; if he gained any information by that he can answer. Overruled.

The WITNESS.—It looked like a common everyday sage-brush country. The character of the ground to the west of the ground in question, and along the westerly border of the two tracts, was kind of a gentle slope or rolling, and to the west, along the edges, there was cedar, little cedars on it. With reference to oil production, when a well is first brought in, the oil is gathered, by gravity if [89—60] possible; this was possible on the Fifer tract. In this gathering process, the operations are made to cover all wells that we possibly can under conditions. The first Fifer well was towards the head of the coulee, as far as the Fifer land is concerned. There were other Fifer wells in that vicinity; the Montacal-Fifer 1; the Montacal-Fifer 2 was drilled, but was not productive. When we started assembling the oil from Fifer No. 1 and

(Testimony of L. F. Sontag.)

Montacal No. 1, it was taken from those two wells to a gathering point by gravity through a two-inch line, located by the coulee. That is the same coulee that was impossible of passing until we got below it on the bridge. That pipe-line as laid there was above the surface. It was laid to keep the low places out of it, so we could get the best gravity. It was below the level of the top level of the coulee. That pipe-line would have no interference with farming operations there at all, that I could see. That pipe-line was taken from those wells to tanks at the central pumping station, which was located in the vicinity of No. 2 well. From that place the oil was taken to the main station to be delivered into Winnett. The main station was located on section 13, which is government land. The handling of this oil from these Fifer wells, down that coulee to the central pumping-plant was necessary for the development of the Franz production; we had to have a pipe-line. There has been changes in the pipe-line since I have been there; the tanks, on account of the drop in production, were made smaller and closer to the well; the connection from the pipe-lines to the tanks had to be changed so that we could get the oil. There was no change in the location of the pipe-line, nor in the size of the pipe-line, other than at the tanks. The only change was a change at the well, that is, the stock tanks from the wells were moved. On the Fifer tract the water-line and the oil-line were laid the same, relative to proximity, outside of branch lines, to

(Testimony of L. F. Sontag.)

the power plant. These oil lines that were put in to handle the Fifer production were not increased, [90—61] that is, as to their taking up more land of Mr. Fifer's, or changed in any way by virtue of the fact that oil flowed through them. They would be identical for handling the Fifer production, as though they handled several places in that vicinity. There is no increase in the character of the trespass, only from one farm to another, or one location to another. A pumping operation was necessary in the Fifer tract to get the oil produced from the Fifer tract to market. The pump installed was the size necessary for the handling of the Fifer production as it came to us. That pump is in the same location, in the same building, and working parallel with the water-pump that has been referred to. There is no great difference in the general equipment of installation for the handling of a hundred barrels or a thousand barrels.

When I first went in there, the telephone line practically followed the line and went to the camp. It has been changed since that, and leaves the line and goes direct to the pump-station by a short route. It comes from the main office and the main pump-station to this pump-station. It does not go out to the wells on the Fifer tract. The telephone line is necessary in case of breakage of pipe-lines, filling of tanks, keep them from running over, and general conditions. The telephone was necessary for the handling of the Fifer production, if we had had no other. It would have been of the same

(Testimony of L. F. Sontag.)

character of installation as it is now, and it would have been in approximately the same location. There were other roads built by the Franz people in addition to the old main highway that went across the tract, between three and four hundred feet to enable them to get to the camp maintained for the men on the Charles tract. The permanent camp for the Fifer as well as other districts, was on the Charles lease, southerly from the Fifer place. This camp on the Charles place served the workmen on the work on the Fifer lease, and the road of 200 feet came down to it. The Franz Corporation built another road there, to [91—62] get supplies and material to the Fifer No. 1 well. There was a road put in from the main road over to the pump-house, but I don't know whether it was made by the Franz Corporation. That would be used in connection with the Fifer operations, hauling material and supplies to the pump-house. I don't ever remember ever seeing that road that goes off to the southwest there on the map. I don't know whether the Franz Corporation put it in or had anything to do with it or not. It was not used by the Franz Corporation while I was there. The public highway that goes across the ground was used by other corporations and persons than the Franz Corporation, to the extent of drilling other wells and producing other wells. We produced five wells by the use of that road, or drilled them, and I think about eight or nine other wells were put in in that vicinity by other people, with the use of that same road. I think a fair estimate

(Testimony of L. F. Sontag.)

of the proportion of that main road as between the Franz Corporation and the outsiders, about five to nine. When we got under way with the production, that road had to be repaired, and it was grade up and taken care of every year by the Franz Corporation. Mr. Fifer was never there at any time when the road was being repaired or used, to my knowledge; I never saw him there.

Defendant's Exhibit No. 14 accordingly shows the main highway as it goes down and across the Fifer tract, going towards his ranch buildings and barns, and we had repaired it.

During the time that I was on this Fifer tract, it was not surrounded by a fence, that is, entirely surrounded. There was evidence there, however, of there having been a fence around the entire tract. The only two gates that I ever noticed in this fence was on the northwest corner, the entry to the Fifer place, and leaving the corner, going to the Charles place. In our use of the Fifer tract, we never broke down any of the Fifer inside fences or cross fences, to my knowledge. I couldn't say whether the inside or cross fences had any gates in them or not. The only fences that [92—63] I came in contact with were the outside ones. The fence enclosing the meadow or garden tract was a better fence than that enclosing the general tract, the last time I saw it. It had pickets sticking in it now and then, so that a person could not get through it, and the fence seemed to be in very good shape the last time I saw it. As far as I know, it entirely enclosed the inside tract. In our opera-

(Testimony of L. F. Sontag.)

tions there, the Franz Corporation never had occasion to drive across or through any of the inside fencing of this garden or meadow tract.

The only time that Mr. Fifer ever discussed with me the question of his leaving his property and going to town to live was on the street in Lewistown; Mr. Landz and I met him one time and he said he was going to leave the farm and take a rest. He did not give any other reason as to why he left it, at that time. Exhibit No. 15 correctly shows the ground as I knew it during the time that I was operating there; this is looking westerly across toward the wells of the Montacal and Fifer No. 1.

Cross-examination by Mr. FORD.

I said I came to the Cat Creek field about September 23d or 24th, 1920. At that time I was superintendent of the pipe-line, gathering the oil for delivery to Winnett. I was working in the field at that time. When I first went there, there was no production on the Fifer tract. The pipe-lines we were building were to cover the production from the Charles and Montacal. I don't believe there was any Montacal production in 1920 on the Fifer tract. I don't believe there was a pipe-line in there to handle any Charles production at that time. We put in a pipe-line afterwards, when the Charles No. 2 came in, some time during the summer or fall of 1920. They were drilling the Charles No. 2 when I came into the field. It did not come in until several months after I came; I think it came in along about June of the next year. I don't just remem-

(Testimony of L. F. Sontag.)

ber when the Montacal-Fifer No. 1 came in, but there wasn't much difference [93—64] in the time that the two wells came in, as I remember it. The production from the Charles No. 1, the discovery well, was put into tankage and sold for fuel. No pipe-line carried it out of the field, as I remember. As I remember now, the Charles No. 2, and the Franz-Fifer No. 1, and all those wells were drilled about the same time. I think the production from the Franz-Fifer No. 1 was about 65 or 70 barrels when it came in. We keep production slips, a record of the production of the various wells, but I haven't got them with me. The Fifer No. 1 was about the same as most of the wells in that field, with respect to dealing in production. I couldn't say what it was producing at the end of thirty or sixty days. At that time Mr. Landz had charge of the production and I had charge of the pipe-line. I couldn't say whether it was a very big production. We drilled the Fifer No. 1 deeper and raised the production to about twenty barrels, I think, from a barrel and a half, in June, 1922. It is not producing now; we are cleaning it out again to try to make it produce. At the time we shut down preparatory to cleaning it out, it was producing a barrel and a half, and No. 2 was producing about the same. After we shot No 2 with nitroglycerin, it produced about seven barrels for a while. That was a year ago this spring, or during the winter some time, I believe. I have no record of when we ceased the drilling operations on the Fifer tract; I couldn't say. The Franz-Fifer No. 2 well was

(Testimony of L. F. Sontag.)

brought in some time during the summer of 1921, and as far as I know there has been no drilling of any kind by the Franz Corporation on the Fifer tract of land.

With reference to the use of this pumping station, I would have put in a pumping-station of the size and capacity there to take care of the production of the Fifer tract, and I would have put in that pumping-station to take care of the 45 or 50 barrel production of the Fifer No. 1.

Q. What was the cost of that pumping-station?
[94—65]

Mr. BROWN.—We object to that as immaterial.

Mr. FORD.—I think it is immaterial.

The COURT.—He may answer. Here they have a lease. In preparation for their expected output they build their plants. I do not think because the wells don't win out or have very much oil, the fact that they have a larger plant than they now seem to justify—that is, looking backwards—would impose any liability, but he may answer. Overruled.

Whereupon, the defendant then and there duly excepted to the ruling of the Court.

The WITNESS.—This plant cost to complete in the neighborhood of maybe five thousand dollars, between five and six, which included the pipe-lines. The work on the power-station was commenced by Mr. Landz some time in August and completed by me in September, 1921. This pumping-station serves as a gravity plant. All wells can deliver their oil by gravity in that, and those wells are the

(Testimony of L. F. Sontag.)

two Wood wells, two Charles wells, two Fifer wells, one Montacal well, three Brown wells, one Golden West well and one Tip O'Neill well. The two Mosby Oil Company wells have never produced any oil. I think there are three wells on the Mosby tract now, but none of them are producing.

Q. How many wells have been drilled across the river by The Franz Corporation where the road through the Fifer tract was used in the hauling of material?

Mr. BROWN.—Objected to as not proper cross-examination.

The COURT.—I think so; you went into the question of wells across the river served by this road or over this road. Overruled.

Whereupon, the defendant then and there duly excepted to the ruling of the Court.

The WITNESS.—There was the Antelope and two Woods wells and the Jackson well, and I think two others that were drilled before I came. On the west of the river where the materials were hauled to the Fifer place, there were drilled by the Franz people the O'Day, three wells on the Charles, and two wells on Fifer. The roads were built [95—66] and established on the Fifer tract before I got there, and the drilling operations on the Fifer tract was commenced in 1921.

The Franz Corporation furnished the pipe for the purpose of getting the water to the tract of land that this man living on Fifer's place at the present time asked for for irrigation purposes. We did not offer it to him; he took the water, but he said he

(Testimony of L. F. Sontag.)

was not getting enough, and then we laid the line and gave it to him, because we wanted him to raise vegetables for the camp. I don't know whether that was after the suit brought by Mr. Fifer or not. It was early last summer some time that we made the agreement and laid the pipe-line to furnish this water to raise the vegetables on the Fifer tract with. As far as I know we are still furnishing the water for that little tract. I heard the old man say he was fixing up his fence around the little garden there last year. There was more acreage than 2.95 acres in that little patch there last summer where he raised his watermelons and beans. It may be that now, according to that map, but there was more than that there last summer. I do not mean to say that during the time that I was there, from September 24, 1920, that these fences were all intact; that is, the outside fences. As far as I know, the inside fences were. I have seen a cow now and then on the inside of the Fifer tract. The Franz horses were not turned out after I took charge of the property; hay and feed was bought, and they were fed in the corral and barn. I took charge of production in September, 1922. At the time Mr. Landz was in charge there, I never seen the Franz horses ranging on Mr. Fifer's meadows or fields. They were always busy working when I was down on the job. I have never seen that south forty under cultivation; it looked just like sage-brush and open prairie to me. I never paid any particular attention to see whether any part of it was cultivated or not; just casually looked across it. I

(Testimony of L. F. Sontag.)

never did see any evidence of posts setting there during the time that Mr. Landz was in charge of the operations, [96—67] between the river and this corner that was practically destroyed, the point marked "11" on the map.

I want this jury to understand that with all of the operations being carried on there by the Franz Corporation, that none of the outside fences were torn down by teamsters, or driven across and destroyed, only at the entrance and outlet that we had. The fences might have been crossed at other places, on occasions, like getting to Fifer No. 1. Outside of the entrance and the outlet, in the operations conducted by the Franz Corporation, there was no occasion to tear down any fences; I don't know that they did. When I went there in 1920, the tract of land shown in the photograph, marked Exhibit No. 8, was in some kind of hay, timothy or blue joint, and now a majority of it is being used for garden purposes.

Redirect Examination by Mr. BROWN.

The WITNESS.—In my oil experience and in the location of similar pumping-plants and pipe-lines, I have had occasion to buy and rent the right to put in similar installation to that we have on the Fifer tract.

Q. In the oil trade and in your experience what has been the average price that you have paid for a similar privilege of installation?

Mr. FORD.—To which we object as being incom-

(Testimony of L. F. Sontag.)

petent, irrelevant and immaterial. There is nothing to show that the same conditions prevailed.

Mr. BROWN.—Withdraw the question.

Q. Have you had occasion to rent the surface-right privileges for use similar to what you have here under substantially similar conditions as are in existence on the Fifer tract?

Mr. FORD.—To which we object for the same reason; different locality.

The COURT.—Yes, conditions may differ wherever lands are separated by any particular distance.
[97—68]

Whereupon, the defendant then and there duly excepted to the ruling of the Court.

Mr. BROWN.—I believe I am entitled to show from a witness whether or not he has purchased under substantially similar conditions; whether or not he has or has not is for him to determine.

The COURT.—You are asking for a conclusion in the first place. Objection sustained.

Whereupon, the defendant then and there duly excepted to the ruling of the Court.

Q. From your experience, operating under conditions similar to those on the Fifer tract, what would you say was a fair rental value for the use of the Fifer tract for the use you have put it to?

Mr. FORD.—Same objection.

The COURT.—What are you contending for?

Mr. FORD.—We are suing for damage to the crop and damage to the premises.

The COURT.—Yes. I see; they are not suing

(Testimony of L. F. Sontag.)

for use and occupation, suing for damages. Objection sustained.

Mr. BROWN.—We would like permission to make a written offer of proof later.

The COURT.—You may.

The WITNESS.—I said the pipe-line, for the irrigation of that little garden, was put in last summer, some time early in June, I believe.

DEFENDANT'S WRITTEN OFFER OF PROOF.

We offer to prove by the witness on the stand, L. F. Sontag, that he is experienced in the renting of similar lands to the Fifer lands for surface use purposes such as the Franz Corporation is making of the lands here in controversy, and that a reasonable rental value of such lands for the purposes such as the Franz Corporation is making of these lands is one hundred dollars per year.

Mr. FORD.—To which the plaintiff objects on the ground that the [98—69] witness has not shown himself qualified, and from his testimony it appears that his experience in the renting of land was not had in or near the land in controversy, but, on the contrary, was had in adjoining states; and for the further reason that the rental value of said land for oil and gas mining purposes is not a material issue in this case.

The COURT.—The offer is denied and exception may be noted.

(Witness excused.)

Testimony of David Hilger, for Defendant.

Whereupon, DAVID HILGER, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. MARSHALL.

My name is David Hilger. I reside at Lewistown, Montana; I have resided in Fergus County for about forty-two years. The Cat Creek oil fields are located in Fergus County. During the time I have resided in Fergus County, I have been in the livestock business, ranching; I was register of the United States Land Office there for four years, from 1894, and then I was in the general land office practice and loan business for quite a number of years; probably ten or twelve years. I was also in the real estate business in that county. I am interested in a ranch on Flat Willow Creek, about 3,500 acres, of which practically 1,000 is under irrigation. I have been engaged in the livestock business, and farming business, both irrigated and dry, on this ranch, and am so engaged at the present time.

I think I know where the Fifer ranch is located on the Musselshell River, from the descriptions and plats that I have seen. I have been to the Charles well in Fergus County; I made quite a number of trips down there to that section in 1920, 1921 and 1922. I know where section 16 and the Charles tract is located, and I know the land in question lies between that; I have been over the land. I

(Testimony of David Hilger.)

think I am familiar with the values of eastern Fergus County land, also familiar with the value of pasturage lands and irrigated lands. [99—70] The general nature of the lands along the Mussel-shell River and particularly these lands as you go down into the bottom lands, it is getting pretty well down into the breaks, it is pretty rough; the bottom is not very wide, and there's bad land breaks coming in on either side along there.

Basing my opinion upon my experience of 42 years in Fergus County as an irrigation farmer and a dry-land farmer, and upon my experience as Register of the United States Land Office, and in the real estate business, in my opinion, 120 acres of this land in the breaks of the Mussel-shell river, particularly the land in question, for farming and stock-raising purposes, during 1919 and 1920, would be worth, the irrigated land under a permanent water supply on those bottoms, I would put the maximum value at about \$50.00 an acre. That would be dependent upon a permanent, reliable water supply. The grazing lands are not a great deal of value, probably—basing it on rental values where I am located about 25 miles from there, for state lands we pay \$100.00 a section of 640 acres. That would be about what we pay for grazing values; I have rented other lands around there; we have never exceeded the value of \$100.00 a section for grazing purposes. That would be something like 15 or 20 cents an acre. If the testimony shows that the water supply on this

(Testimony of David Hilger.)

tract is from the coulee, dependent upon one or two small springs and the winter snows and spring rains, in my opinion it would not be as valuable, the irrigated lands, as where it was located under the permanent ditch. It would be of less value than \$50.00 an acre. A water right out of a coulee that only runs when the snow goes off or during the heavy rains would certainly be of less value.

In my opinion, basing it upon my experience, the construction of highways and telephone poles and water-lines which are buried, and oil-lines which are on the surface, would not alter the value of the grazing land, on land of the character described unless it [100—71] had a tendency to throw it open to the public.

Q. Mr. Hilger, in your opinion, taking a 160-acre stock ranch and farming ranch, as the evidence shows it varies from 20 acres to 40 acres of land that can be plowed or meadow land, surrounded on the north by a school section which is not controlled by the owner, surrounded on the north and west by patented land and on the south by patented land, in other words, a secluded 160 acres, to the very extreme we will say about 50 acres that is susceptible of being farmed and the balance grazing land, what, in your opinion, would be the reasonable rental value of that piece for one year, or 1920, 1921 and 1922, for stock-growing purposes and general farming purposes?

Mr. FORD.—To which we object as being based upon a condition that is not shown by the evidence,

(Testimony of David Hilger.)

namely, there is no testimony that the land to the west is deeded land, the testimony shows that there is an excess of 50 acres of cultivated land upon the premises.

The COURT.—I think you have restricted the cultivated or meadow land below what the evidence justified. The objections will be sustained to the question.

Whereupon the defendant then and there duly excepted to the ruling of the Court.

Q. Referring to the land in question, the E. J. Fifer land, as you know it, located on the Mussel-shell river, assuming that 60 acres of it is capable of being farmed and the balance is grazing land, what, in your opinion, would be a reasonable rental value per year for that 160 acres as a stock-raising and as a farming ranch? [101—72]

The WITNESS.—I would say not to exceed \$500.00; about \$400.00 would be the rental value for stock ranches that is largely used for grazing and raising some hay for stock purposes. On the basis of \$20.00 an acre, \$3,200.00 that would be for ten per cent, I would say \$400.00 that would be the actual cash value per year, covering the years 1919, 1920, 1921, and 1922, as a general renting proposition.

Cross-examination by Mr. FORD.

When I put the value of \$3,200.00 on this land, I am placing that value upon some experience I had recently on my own ranch of a loan basis made by the Federal Farm Loan Bank and other par-

(Testimony of David Hilger.)

ties, giving the value of similar irrigated lands. Fifty dollars an acre is the limit that they will place as a value on irrigated lands. They put that value on as actual cash value of the land, and the loan purpose is not to exceed fifty per cent of that, or about forty per cent. The \$50.00 an acre for irrigated land by the Federal Reserve Bank is a value that is placed upon it for loaning purposes. For loaning purposes it is the disposition of the loan companies and the Federal Loan Board, to place an under value upon the property; that is, irrigated land, with reference to loan values, these under values; they are supposed to place an actual cash value upon it, but it is true it is undervalued for loan purposes. Generally speaking, the values for loan purposes is supposed to be considerably less than the real and market value of the land, but it has not resulted so in actual experience, in my observation. My observation has been that the value for loaning purposes has been too high. I won't say so much about irrigated land. Irrigated lands maintain their values a great deal better than dry lands. In placing the value upon the Fifer tract of land, I take into consideration the value that the Federal Loan Board placed upon my land, situated some thirty-five miles from [102—73] the Fifer tract, to some extent. Well, I also take into consideration the fact that it is quite a ways from market, and Winnett is the nearest point of market. It is a stock ranch, and hay that would be raised there would naturally have to be con-

(Testimony of David Hilger.)

sumed by stock that you put on that place, and the distances from marketing point is a considerable difference in irrigated land. In times gone by, the fact that a tract of land was located far from a railroad in a stock-raising country and when you had access to the public lands, worked to the advantage of the owner of the property. I think that that is a very good stock country, and an accessible ranch would have a tendency to increase the value of bottom land that produced hay. There is no question about it.

Q. I say, we will assume that this 40 acre tract will produce from 30 to 45 tons of blue-joint hay, that the reasonable market value at that point is \$25.00 to \$30.00 a ton, then Mr. Hilger, what would be your judgment as to the value of the Fifer tract of land?

Mr. MARSHALL.—We object to that, assuming a state of facts not shown by the evidence. It is not 40 acres.

The COURT.—How many acres did you state?

Mr. FORD.—I said 40-acre tract.

The COURT.—I don't think you have it; I think all your witnesses show less.

Q. Mr. Hilger, assuming that the tract of the Fifer land in the east forty west of the river, approximately 30 acres, would produce from 30 to 45 tons of blue-joint hay per season and that the reasonable market value of that hay was from \$25.00 to \$30.00 a ton, with that assumption what then

(Testimony of David Hilger.)

would you say would be the reasonable value of the Fifer tract of land?

Mr. MARSHALL.—We object to that as assuming a state of facts not shown to exist, as there is no thirty dollar a ton hay on the particular forty. Thirty dollar hay was confined to the [103—74] clover forties.

The COURT.—Oh, no. Answer the question.

Exception noted.

The WITNESS.—I would consider it to be of more value if it produced that much hay, yes. If the total production from that five or six-acre tract to the east of the river were three tons of alfalfa hay per acre per year, and the reasonable market value of that hay in that vicinity was from fifteen to twenty dollars per ton, that would increase its value over the value that I would put upon the Fifer tract.

Q. Assuming that thirty acres of the Fifer tract was seeded to clover, thirty acres in the south forty, was seeded to clover, a sweet clover that would yield from one to one and a half tons per year per acre, and that the reasonable market value of that sweet clover was from \$15.00 to \$20.00 per ton, what then would you say? What effect would that have upon the value?

A. It would increase the value of the land.

Mr. MARSHALL.—That is assuming a state of facts not shown by the evidence.

The COURT.—Overruled.

(Testimony of David Hilger.)

Whereupon the defendant then and there duly excepted to the ruling of the Court.

Q. Now, assuming that the Fifer tract is capable of producing from 30 to 45 tons of blue-joint hay per year of the reasonable value of from \$25.00 to \$30.00 per ton, that six acres across the river is capable of producing 15 to 18 tons of alfalfa hay of the reasonable value of \$15.00 per ton, that thirty acres in the south forty is capable of producing 30 to 45 tons of sweet clover of the reasonable value of from \$15.00 to \$25.00 per ton, then what would you say would be the reasonable market value of the Fifer tract per acre? •

Mr. MARSHALL.—Same objection.

The COURT.—Overruled. [104—75]

Whereupon the defendant then and there duly excepted to the ruling of the Court.

The WITNESS.—Well, it would materially increase its value, probably \$30.00 an acre, might possibly \$40.00; with these conditions and that value for hay. I spoke too of land for grazing purposes, that I had paid \$100.00 a section for leased land; that is not under cultivation. That is grazing land strictly. The fact that 60 to 65 acres of the Fifer tract is in sweet clover and blue-joint hay and alfalfa hay would increase the value of that for pasturage purposes, after the harvesting of the crop. As a matter of fact, if there is that much land in clover and blue-joint and alfalfa, I don't know whether \$100.00 to \$150.00 a year would be a reasonable value to place upon the pasturage

(Testimony of David Hilger.)

upon that place. We feel in paying \$100.00 a section for much better grass land than that, that we are paying a pretty high price, and more than we are justified to by the stock business. After you cut your hay in the summer, there is a considerable growth that makes very good pasture for stock purposes; not so much of blue-joint, but there is with the alfalfa. I have had no experience with clover; I couldn't say about that, but I think it would. Taking those things into consideration I would think it would be worth \$100.00 to \$150.00 a year for the value of that place for pasturage purposes.

Redirect Examination by Mr. MARSHALL.

I know the value of alfalfa hay during the years of 1920, 1921 and 1922, in this immediate vicinity.

Q. How much was it a ton in the vicinity of your ranch, which was thirty miles distant?

A. You mean the value of hay up at the ranch I am interested in?

Q. Yes.

Mr. FORD.—We object to that. His ranch is located 30 to 35 miles distant from the land in question and an agricultural and irrigated country.
[105—76]

Mr. MARSHALL.—The same distance that Winnett is from this ranch, a trading point.

The COURT.—You have to take into consideration the peculiar situation of this land, way off from the railroad; if there was any market at all, it might be worth more there than at the railroad;

(Testimony of David Hilger.)

it depends upon circumstances altogether as to what the value of hay would be. I don't think a mere general market in the centers of trade or of a hay exchange would be a fair test. The objection to the question will be sustained.

Whereupon the defendant then and there duly excepted to the ruling of the Court.

My ranch is located about 24 miles from Winnett and about 26 miles from Roundup, both railroad points. My ranch is located in a general stock-raising section of Fergus County, and I guess it is about probably twenty or twenty-five miles straight across the country from this particular land. My land is located on Flatwillow Creek, in a similar vicinity where hay is purchased when it is needed, and sold right there at the premises and not hauled to market.

Q. How much under those conditions was hay worth in that vicinity? What was the market value during the years 1920, 1921 and 1922?

The WITNESS.—This year we have a lot of alfalfa that we can't sell at all, from last year's growth. We sold a lot of hay there at different times from six dollars a ton to ten dollars; [106—77] alfalfa hay, in the fall of 1919, we sold it for higher value on account of the general very scarce hay conditions in that country at that time; in 1920, 1921 and 1922, we sold it at \$10.00 a ton, is the most we got, and last year's crop we haven't been able to sell at all.

(Testimony of David Hilger.)

Recross-examination by Mr. FORD.

The WITNESS.—My ranch down on Flatwillow Creek is located in an irrigated district. There are approximately 1000 acres of my land under irrigation there, and I raise principally alfalfa upon that irrigated land. There are a number of ranches up and down the creek that irrigate more or less. I think we probably irrigate a little more than the other ranches adjoining us above or below. There may possibly be as high as four or five thousand acres up and down the creek, within the vicinity, within a reasonable distance, that is irrigated. The stockmen down in our vicinity raise the feed that they need for their own purposes. We run stock and feed it, but in our experience we have always put in a good deal more hay than we consumed ourselves, and sell that if we can. All the stockmen in that vicinity aim to carry stock enough to consume the feed, if possible, and they don't intend to carry more stock than they have feed to take care of it.

Witness excused.

Testimony of Walter O. Downing, for Defendant.

Whereupon, WALTER O. DOWNING, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. MARSHALL.

My name is Walter O. Downing. I reside at Lewistown, Fergus County, Montana, and have been a resident of Fergus County since 1882. Dur-

(Testimony of Walter O. Downing.)

ing that time I have been engaged in stock-raising, farming, real estate and loans. My stock-raising and farming business has been carried on all over Fergus and Judith Basin Counties. I have been engaged in real estate since 1912. During that time I have been engaged, I have been called upon to go to [107—78] *go to* different sections of Fergus County for the purpose of making investigations of lands. I am familiar with the E. J. Fifer ranch on the Musselshell River, approximately thirty miles east of Winnett, and have been familiar with it for something over two years. I have had experience in making investigations for the purpose of ascertaining values, for loan companies and for the County Commissioners of Fergus County.

Q. Assuming the Fifer ranch to be composed of 160 acres of land running in an L-shape, the east forty acres having the amount of agricultural land as is shown by this plat, and the south or extreme southern forty having 25 to 30 acres that is capable of being farmed, what, in your opinion, is that ranch worth as a stock-raising and an agricultural ranch?

A. At the present time?

Q. Yes, at the present time?

Mr. FORD.—Objected to as incompetent, irrelevant and immaterial; the value is not now.

The COURT.—Sustained.

Whereupon the defendant then and there duly excepted to the ruling of the Court.

(Testimony of Walter O. Downing.)

Q. What, in your opinion, would that land be worth during the year 1919?

Mr. FORD.—Objected to as being prior to the time of the damage complained of.

The COURT.—The objection is overruled. Answer the question.

The WITNESS.—I would say between fifteen and twenty dollars an acre at that time.

Q. Would you consider that the value of the land was reduced to any considerable degree by reason of the fact that two oil wells have been drilled upon the grazing land and oil-lines and pipe-lines and telephone lines have been placed across the grazing land and across the agricultural lands? [108—79]

Mr. FORD.—I object to that as assuming a state of facts not shown by the evidence.

The COURT.—The question would seem on the theory on the part of both parties. The objection will be sustained.

Whereupon, the defendant then and there duly excepted to the ruling of the Court.

The WITNESS.—The fact that this particular land is covered by pipe-lines, telephone lines, oil-lines, as shown on the map, in my opinion, that would not decrease the value of this particular ranch at all, from the standpoint of a stock-raising and agricultural ranch, so far as the pipe-lines go on the agricultural land. In my opinion, basing it upon the experience of farming in Fergus County, and being in the real estate business there,

(Testimony of Walter O. Downing.)

I would say about \$250.00 a year would be the reasonable rental value of the Fifer ranch.

Cross-examination by Mr. FORD.

The WITNESS.—That is based upon what I consider the value of the agricultural land is worth per acre from rental value and of the pasture land. I have seen this particular land probably thirty times, last year, and the year before a great many times. I don't know what the land was producing prior to 1921; not as particularly as I did in 1921. I was down there in 1920 two or three or four times. I didn't see many crops growing on that place. There were some; there wasn't very much in evidence in crops at that time. I would be surprised if you were to tell me that the evidence shows that from this tract west of the river, on the east forty, forty-five tons of blue-joint was produced, because I did not see the stacks. I said I was engaged in the real estate and loan business. In fixing the value of this piece at \$20.00 per acre, I took into consideration the loan value, all the different ways that I have of figuring out the values of land, through loan values, through their accessibility, through their [109—80] opportunity to deliver stuff from that to any market, the character of soil, and so forth. I didn't see any irrigation system on this place when I was down there. If you just figure your irrigation from the spring freshets and from springs that are there, it wouldn't change my opinion much, I would have to see it first. If it is a fact that this tract is

(Testimony of Walter O. Downing.)

watered one or two times a year from spring freshets and melting snow, I would say it would increase the value of the land, possibly.

Assuming that this land is capable of producing thirty to forty-five tons of blue-joint hay and that the reasonable market value of the hay so produced was \$25.00 to \$30.00 a ton, if that were all so. That would change my idea of the value of that tract of land. Assuming that you had six acres of alfalfa east of the river that was capable of producing fifteen to eighteen tons of alfalfa a year and that the reasonable market *market* value of that alfalfa in that vicinity was from \$15.00 to \$20.00 per ton, that would in my opinion increase the value of this land.

Assuming that thirty acres of the south forty is in sweet clover and that the clover is capable of producing from thirty to forty-five tons per year, that the reasonable market value in that vicinity is from \$15.00 to \$20.00 a ton, if that were true, in my opinion, it would increase the value of that land.

Assuming that the six acre tract across the river was capable of producing fifteen to eighteen tons of the reasonable market value of \$15.00 to \$20.00 per ton; that the meadow across the river was capable of producing 39 to 45 tons of blue-joint of a reasonable market value of from \$25.00 to \$30.00 a ton; that the thirty acres of sweet clover was capable of producing 30 to 45 tons of the reasonable market value of from \$15.00 to \$20.00

(Testimony of Walter O. Downing.)

per ton, I would say the reasonable value of the Fifer tract of land would be about \$4,500.00. [110—81]

Redirect Examination by Mr. MARSHALL.

Q. From your knowledge and from your number of visits that you have made there, are these assumptions real or mythical, as given you by Mr. Ford?

Mr. FORD.—To which we object as being incompetent, irrelevant and immaterial.

The COURT.—It is for the jury to say.

Whereupon, the defendant then and there duly excepted to the ruling of the Court.

Witness excused.

REBUTTAL FOR THE PLAINTIFF.

Testimony of E. J. Fifer, for Plaintiff (Recalled in Rebuttal).

Whereupon, E. J. FIFER, the plaintiff herein, recalled as a witness in his own behalf, in rebuttal, testified as follows:

Direct Examination by Mr. FORD.

I heard the testimony of Mr. Landz and Mr. Sontag with reference to my not having complained or protested against the tearing down of my fences and the use of my land in the manner as has been described, and I wish to say that the facts are that I certainly did complain to Mr. Silas Green Sodder, foreman of the roustabout and pipe-lines, and had charge of the teams, in 1920. He said, "They will

(Testimony of E. J. Fifer.)

make it right with you; I am sure Mr. Kelly is a fair man and am sure he will make everything right with you." I heard the testimony of Mr. Sontag to the effect that he and Mr. Landz met me on the streets of Lewistown, that I told them that I was giving up the farm and going to take a rest, but to my knowledge I did not make a statement in that form.

Cross-examination by Mr. MARSHALL.

I did not make that statement in any other form, not that I know of; in no form that I can recall to mind.

Q. Did you say—you did not say to Mr. Sontag, "I am leaving the place down there"?

A. I am sure I quit.

Q. I beg pardon? A. Yes, sir. [111—82]

Witness excused.

The plaintiff rests.

Mr. BROWN.—Comes now the defendant and moves the Court at the close of the case to direct the jury to find a verdict in favor of the defendant, on the ground and for the reasons:

1. That the complaint does not state facts sufficient to entitle the cause to be submitted to the jury.

2. The proof is wholly insufficient to prove the allegations of the complaint or any damages to the plaintiff or that he is entitled to any damage, the proof shows that whatever use and occupation was had of the premises by permission and under contractual relation that gave express authority for

such, and there is a total failure to prove any damage other than damage which is expressly authorized or would be *damnum absque injuria*.

3. There is confusion in the proof to such an extent that the plaintiff has failed to prove his case. It cannot be determined whether or not the damages of plaintiff were due to causes for which the defendant might be responsible or due to the acts of third parties, or due to causes that are expressly relieved from in the lease agreement, and there is no sufficient proof of the causes being from the defendant or upon his responsibility to entitle the case to be submitted to the jury.

We submit that without argument.

The COURT.—Does counsel for plaintiff want to submit a like motion?

Mr. CHOATE.—If it please the Court, at close of the evidence of plaintiff moves the Court to instruct the jury to return a verdict for the plaintiff upon the proof submitted in the sum of ten thousand dollars.

The COURT.—The Court will deny the defendant's motion and will grant the plaintiff's to the extent of directing the jury to return a verdict in favor of the plaintiff, but will leave to [112—83] the jury the amount, which parties will argue to the jury.

Whereupon the defendant then and there duly excepted to the ruling of the Court.

There is no question that the evidence shows some destruction of fences that are imputable to the defendant, more than is warranted by the lease.

I find nothing in the lease that will warrant destruction of the fences; in fact, the lease expressly provides the defendant will pay any damages to fences and also to crops. Undoubtedly the defendant and plaintiff agree that the [113—83½] defendant might go in and do anything upon the land in the way of drilling for oil, taking it out, building structures for that purpose, pipe-lines and the like, in so far as reasonably necessary to discover and make use of that oil in plaintiff's land; but equally there is no question that the lease does not authorize the defendant to go in and use these premises as a basis for operations on other lands than the plaintiff's, and if it did—and there is evidence that it did—and if that added to the damage that the land suffered by reason of those operations, of course, to that extent the defendant would be liable.

The Court will rule, however, when it comes to the instructions, that so far as any damage was done to the land by the mere drilling operations on this land, and in so far as injury was done to the land by structures for this land, that, in legal contemplation, is not a damage, that is the very thing the parties provided should be done. That is different than the temporary injuries to crops and fences, for which the lease expressly provided. There is a clause in the lease that the defendant will pay for any damage to fences and to crops or for damage upon said premises, but I cannot believe that these parties by "other damage" meant the ordinary results of drilling and pumping oil out of this land and building structures for that purpose.

So that will be the ruling of the Court and the parties may proceed knowing just about what I will instruct the jury. As I see it, there is nothing left but the amount that is due the plaintiff.

Whereupon, respective counsel made closing arguments to the jury.

Instructions of the Court to the Jury.

Gentlemen of the Jury: In this case, as in all others, you have heard the evidence and the argument and now it is for the [114—84] Court to deliver to you the instructions or charge, generally to make you acquainted with the law, which, as you know, you take from the Court, though on occasion it may extend to comment upon the evidence. While you take the law from the Court, of course, as you well know, you determine the facts for yourself from the evidence and circumstances in proof before you.

In this case, as in all others, the complaint, upon which the plaintiff founds its cause of action, is not itself evidence against the defendant, nor in behalf of the plaintiff. This is what is termed a civil action, an action between two private parties, the Government not having any interest in the case except to afford the machinery through you and myself to get justice between these two contending parties. The difference between a civil action, like this, and a criminal action is that whereas in a criminal action the proof must go to the guilt beyond a reasonable doubt, that is to say, the party having the burden must prove its case beyond a

reasonable doubt, but in this case the party who must prove his case it suffices if he furnishes to you the greater weight of the evidence, which, as you will observe, is not as high a degree of proof as to prove a thing beyond a reasonable doubt. In a civil action you may consider that you had a scales before you with the evidence of each party in one or the other balance hands, and in that case, if the evidence of the plaintiff outweighs the evidence in behalf of the defendant upon any disputed point the plaintiff is entitled to recover as proving his case by the greater weight of the evidence.

The rules in respect to credibility of witnesses and the weight to be given to evidence and how you determine the truthfulness of witnesses and the like are the same in this variety of case as in a criminal case, and you have been told those rules so many times that I imagine you can almost lecture on them, and the [115—85] Court does not need to go over them again.

This case, after all, is very simple. The plaintiff is entitled to recover, and the only question is how much; though, of course, when you come to determine how much it may not be quite as simple as at first blush it seems to the Court in saying so. The plaintiff is entitled to recover whatever will compensate him for any injuries that the defendant has done to the plaintiff's crops which include the entire crop or pasturage, any damages or injuries that the defendant may have done to the plaintiff's fences on the land, and any damages that the defendant may have done to the land itself, other

than those that followed from its development of oil upon this particular land itself.

The plaintiff had title to the land involved in this case—not at all material how he had acquired it—but the fact that he owned the title is the material portion, and of course the character and value of the land before that was injured. They are in possession. The defendant's predecessor in interest, one Franz, came along, and he and the plaintiff entered into a contract, a lease, wherein the plaintiff leases this land to Franz for the purpose of developing and taking from it any of the oil that might be found in it, and in order that that might be done—and it was for the benefit of both parties, because the plaintiff was to get a portion of the oil,—in order that that would be done the lease provided that Franz might drill wells and place thereon necessary structure for the purpose of finding the oil, of producing it and saving it and transporting it off the premises. This inevitably would involve entry on the land by Franz or his successor, the defendant in this action, and the drilling of wells, the passing over the land, carrying on of materials and supplies, and the erection of certain structures, like derricks and pipe-lines to transport it off the land and to the main pipe-line, telephone lines and the like. In addition [116—86] to that, the lease provides that the defendant will pay to the plaintiff any damages, for any damages that the defendant may inflict upon the plaintiff's crops or upon the plaintiff's fences or any other damage. As the Court and the law construes the lease, this

would compel the defendant to pay for any damage to crops and fences, no matter whether necessarily inflicted in attempting to find and dig oil from this land or not, but it does not compel the defendant to pay for any injury to the land consequent upon reasonable pursuit in this land of the oil that was supposed to be there, and any reasonable buildings and derricks, a pumping-plant, pipe-lines, telephones and the like for the purpose of taking the oil out of this particular land. No one could call that—the results of those operations—damages, and the party did not have that in mind. They were contracting that he should actually come in and do that variety of work, Franz, for the benefit of them both. But while this lease justified the defendant, as the successor of Franz, in erecting upon this land any reasonably necessary structures for finding and taking of oil out of this land, and that would include all such roads as were reasonably necessary, any pipe-lines reasonably necessary, pumping-plant and telephone, it wouldn't justify the defendant in making this land the basis of operations upon surrounding lands that the defendant was engaged in taking oil from; and if the defendant did make use of this land as a basis of these operations elsewhere, and if by reason of that fact it inflicted greater injury upon the land than was the natural consequence of its operations upon this land, why, for that excess injury it would be liable to the plaintiff as any other trespasser would have been. It is not a matter of contract so far as those damages would be concerned because the contract did not provide that the defendant might inflict

any such variety of injury upon the land. [117—87]

In determining the amount of damages in respect to these various items you are to allow the plaintiff nothing but what is fair and reasonable compensation. The defendant is not to be punished or mulcted more than the plaintiff has suffered. The damages are entirely compensatory. In considering the amount of compensation that the plaintiff will be entitled to, taking first the crops, namely, the hay, any other crop, including his pasturage, if any, that plaintiff will be entitled to what would be the—not market value of those crops as his damage; he wouldn't be entitled to the full value of the crop you see, because in any event to make those crops would cost the plaintiff something, and in so far as he did not expend that cost in making the crops. If I remember right, I think that is the plaintiff's theory, unless perhaps some expended in the second year—why, he is only entitled to the net value of them. Of course, any crops that were lost, the plaintiff would be at no expense for harvesting them, and that would be deducted from the market value of the crops.

The pasturage, if the land had any value for pasturage, and if the defendant destroyed that value, rendered the plaintiff unable to secure it for any particular year, the defendant would be liable for that also. But remember that the defendant is only liable for the damages that it inflicted upon the plaintiff. Of course, however, if it is responsible for the destruction of the fences, so that

strange stock and range stock pastured on the land, in addition to some pastured by the defendant's own stock, why, the defendant is liable for the full value of the crops destroyed, because if it destroys the fences and with reasonable effort the plaintiff couldn't keep them up, the defendant was bound to understand that strange stock would go in and destroy the crops, as the plaintiff insists was done.

In the matter of fences, the defendant bound itself to pay [118—88] for any fences injured; and, again, it is only liable for the fences that it injured and destroyed; it wouldn't be liable for the fences that strangers destroyed, if there were any destruction of that nature. It is to be said that the evidence is not very clear in respect to any of these matters, but you are to arrive at the best solution possible in view of its nature. The plaintiff does say that the fences were practically destroyed about 1921 and thereafter; some destruction before 1920; he tells of the defendant's teamsters taking them down and leaving them down, in some instances taking the wires down at the bottom of the posts, passing over, and then the wagons or chains catching, dragging and destroying more of the fence than where the teamsters actually drove through. Of course, the defendant is liable for any action of any of its teamsters in that respect. And in respect to the fences, in so far as you find the defendant responsible for their injury or destruction, the rule of damages is the reasonable cost that the plaintiff would be put to in replacing

those fences, and in so far as he made reasonable effort to maintain them while the destruction was going on he would be entitled to the reasonable value of his services and expenditures in thus endeavoring to maintain them.

When we come to the land, then this is the situation in respect to that: It does appear that roads were built upon the land by the defendant, and it claims that those roads were necessary for the development of the oil within the plaintiff's lands. The plaintiff says no, these roads were really built before there was any oil development on this land, built to enable the defendant to develop other lands and were unnecessary for the plaintiff's lands. So with the pipe-lines and the pumping plant. The plaintiff insists that they were more extensive and larger than would have been necessary for a reasonable development of its lands. You may remember, [119—89] however, that when this lease was entered into and the defendant proceeded to explore the land for oil, or getting ready for it, no doubt both parties did not anticipate that the production would be as small as it was up to the present time, and—I think the lease still continues—there may be future development. If the defendant overbuilt its plant, yet if it built it in good faith for the development of this land, it is not responsible because it now turns out that the plant is larger than the necessities of the land so far appear to justify. Another thing, if it did build a larger plant than is necessary in the way of pipe-lines, oil and water, and pumping plant, that alone

does not make the defendant liable for more than nominal damages unless they increase the burden upon the land, increase the injury to the land. For instance, let it be assumed that the defendant consciously built a pumping plant intended to serve surrounding territory as well as this land and larger than it would have built for this land alone, if the larger plant does not injure the land any more than a smaller plant would injure the land, then the plaintiff is not entitled to any substantial damages merely because the defendant built it too large for this land. In other words, there must be damage before the acts of the defendant can confer upon the plaintiff a right to collect damages. So with pipelines and other instrumentalities.

As before stated by the Court, any damage to the land itself, due to the defendant's operations upon this land by virtue of the lease, was not within the contemplation of the parties that the defendant would pay for them. They expected that some injury, occupation of the land would follow the contract between them at least, but any damages, if you can find any, to the land that are due to the defendant's operations in the surrounding territory, that would not have been inflicted but for the defendant's operations in the surrounding territory, you are [120—90] directed to allow those to the plaintiff, as he is entitled to them.

Now, when you come to determine the damage to land, the rule of damages laid down by the law is this: In order to arrive at what the land has suffered from a monetary standpoint you take the

value of the land before the injury was done to it and the value of the land after the injury was done to it, and the difference, if any, will be the money value of the damages that have been inflicted. For instance, if you should find that this land was worth five thousand—simply taking that as an illustration—five thousand dollars before the defendant operated upon it and did the things upon it that it is contended it did, and if you find that the land is now worth let us say two thousand dollars—only for illustration—the damages to the land would be the difference between five and two, or three thousand dollars. But that is not all; then it would be for you to determine how much of that is an excess due to the operations of the defendant on the surrounding territory instead of upon the land of the plaintiff itself. If the damages would be as great from the operations of the defendant upon the land itself as they are in connection with the operations of the defendant on the outlying lands, then the defendant's operations in contemplation of law haven't injured the plaintiff at all and he wouldn't be entitled to anything for that; but it is for you to say whether the outlying operations added to the damage on the land and, if so, how much.

Now, there is some evidence, gentlemen of the jury, that in the course of the operations on this land the plaintiff virtually got up and walked off. His testimony is that he found it impossible, reasonably impossible, by any reasonable effort to keep up the fences, and hence he couldn't accomplish

any thing and he left the land. Now, the law is that if one person does [121—91] something that injures another, tears down a fence, the person whose fence has been torn down cannot simply leave it lie down and all the cattle in the country destroy his crops, and expect to get the full value of the crops destroyed. He must make reasonable effort to avoid the damage by putting up his fence again. But if he makes that effort and the fence is taken down again and he employs himself reasonably to keep it up and find that he cannot, then the law will justify him to walk off and leave it as the party who is tearing down the fence has put it, and it is that party then who is responsible for the total destruction of crops, if there are any, by his own stock or outside stock that ranges in, and he is liable for full damage.

I do not think there is any real dispute in the evidence that the fences were torn down so repeatedly that the plaintiff was conducting himself reasonably by walking off and leaving them, providing he knew that this fence was torn down and due to the defendant and not to strangers. The plaintiff has tended to show the destruction of fences was by the defendant and his teamsters and others bringing supplies to the defendant, and the defendant—it is fair to say—has not submitted very much evidence to the contrary. If there is, you will bear it in mind and determine where the truth lies in respect to it. The Court will not go into the figures in respect to fences, crops, pasture and land; you have heard them and they have been gone over by both

counsel, and they are just as well in your mind as they would be in the Court's. It is for you to determine, if you find the defendant is responsible for the destroyed fencing, it is for you to determine from the evidence how much it will cost to restore those fences to the same condition that they were before the defendant injured them. If you find that the defendant is responsible for the destruction of crops and pasturage, then, from all the evidence, looking both to the plaintiff's [122—92] and the defendant's you are to determine what was the value of those crops, what it would have cost to produce them, what the pasturage was worth in that market at that time and at that place, and give to the plaintiff the net value thereof. Of course, in so far as crops were not raised, there is some conjecture always whether the crop would have come up to former estimations in earlier years or whether nature might have been so unkind that there would have been no crop at all. In respect to that there is evidence that the years were normal, the same in 1920, 1921 and 1922, that they had been so before when the plaintiff gave you the figures of the crops that he grew; he assumes to give you the figures of his blue-joint hay in 1920 and to some extent to the alfalfa also. Wherever there is a conflict or dispute in the evidence it is for you to determine. Wherever inferences are to be drawn from circumstances, it is a matter for the determination of the jury.

Now, gentlemen of the jury, I think the Court has given you as much law as is necessary in this case,

mainly the rules of damages, if you find the various items of damages are due to the plaintiff. The Court has instructed you that the plaintiff is entitled to the verdict and you will render it as such, and then it is for you to determine the amount, what is reasonable and what is fair and what will compensate the plaintiff and what is just, no more than plaintiff is entitled to and no less, for the defendant, to the extent that it is responsible, must pay all that the plaintiff has suffered. Wherever there is difficulty in proof, since the defendant is at fault, why, if the allowance weigh a little more heavily upon it than can be clearly seen, it is to blame and cannot complain because it is the one that is the cause of the situation and created the difficulties to supply the evidence to make the proof. The plaintiff is entitled to all that he has been damaged. [123—93]

When you retire to the jury-room you will select one of your number foreman and proceed to a verdict. It takes twelve of your number to agree upon a verdict.

Are there any exceptions for the plaintiff?

Mr. FORD.—No exceptions.

The COURT.—Any for the defendant?

Mr. BROWN.—Defendant excepts to that portion of the Court's instruction which leaves out the oil lines as one of the permanent structures.

We except to that portion of the instruction which says they are liable for the destruction of crops, no matter whether necessary for the taking of oil from these lands or not, for if the taking was necessary it would be out of the lease.

We except to that portion of the instruction which says that they are not justified in using this land in connection with the development of any other, for the reason that the evidence shows that there might be, in case of operation and to facilitate development, conditions, under which this would inure to the land in question.

We object to the consideration by the Court of its instructions of the damage to the fences *in toto* as coming from the acts of this defendant, and its instruction, for the reason that the evidence shows that there may have been damage to fences from other outside or independent operators, and the jury are entitled to consider whether or not this was from this defendant or was from other trespassers, and the Court's instruction to fix responsibility entirely upon the defendant and no other.

The COURT.—Let me interrupt you right there; that is grossly wrong. The Court told the jury that if they can point out to any destruction by others, this defendant is not liable for it, the defendant is only liable for the destruction of the fence so far as he destroyed it.

Mr. BROWN.—I did not mean to misquote. What I mean is the [124—94] question of confusion as to who caused it.

The COURT.—Yes, proceed.

Mr. BROWN.—And the defendant excepts to that portion of the instruction which allows the jury to consider the question of the destruction of the fences being entirely upon this defendant, or possibly upon it, for the reason that there is confusion

upon the issue and not sufficient proof on which the cause should be submitted to the jury.

The defendant excepts to that portion of the instruction that gives as a measure of damages to land the value of the land before and the value of the land after, and also gives a measure of damages for fences and for loss of crops, in that there cannot be three rules of damages, to wit, a general loss and destruction of the land and also a general loss and destruction of its appurtenances; that there can be but one rule, and that must be either the value of the things destroyed or lessened value in the property itself, and the instruction as given is not a correct rule of damages as applied in this case.

The COURT.—Gentlemen, you will be given all the exhibits. Well, gentlemen, you have all the exhibits. You don't need the pleadings and you don't need the lease. You will be given all the exhibits and form of verdict and you will determine the matter. [125—95]

That on the 21st day of June, 1923, an order was made by the Judge of the above-entitled Court extending the time within which the defendant the Franz Corporation should serve upon the plaintiff a draft of its proposed bill of exceptions in said action to and including the 30th day of July, 1923, and now within the time specified by said order the defendant The Franz Corporation presents this its proposed draft of the bill of exceptions herein and asks that the same be signed, settled and allowed

by the above-entitled court as a true bill of exceptions herein.

C. J. MARSHALL,
STEWART & BROWN,
Attorneys for Defendant, The Franz Corporation.

Service of the foregoing draft of the defendant's proposed bill of exceptions and receipt of copy thereof acknowledged this 30th day of July, 1923.

FORD & CHOATE,
Attorneys for Plaintiff.

It is hereby stipulated and agreed that the foregoing is a full, true and correct bill of exceptions herein and the plaintiff hereby waives the right granted by the rules of the Court herein to propose amendments to the foregoing draft of the bill of exceptions herein.

FORD & CHOATE,
Attorneys for Plaintiff.
STEWART & BROWN,
Attys. for Def. [126—96]

United States of America,
District of Montana,—ss.

I, George M. Bourquin, Judge of the District Court of the United States, in and for the District of Montana, and the Judge before whom the foregoing entitled action was tried do hereby certify that the foregoing bill of exceptions is a full, true and correct bill of exceptions in the above-entitled cause and the same is hereby signed, settled and allowed by me as a full, true and correct bill of exceptions herein.

Dated this 7 day of Aug., 1923.

BOURQUIN,
Judge of the United States District Court, in and
for the District of Montana.

That on the 19th day of June, 1923, the verdict
of the jury was filed herein which is in words and
figures as follows, to wit:

(Title of Court and Cause.)

Verdict.

We the jury in the above-entitled cause hereby
find the issues in favor of the plaintiff and against
the defendant and assess plaintiff's damages at the
sum of Thirty-five Hundred Dollars (\$3500.00.)

FRANK A. RICHARDS,
Foreman.

Filed Aug. 7, 1923. C. R. Garlow, Clerk. [127]

Thereafter, on August 7th, 1923, Court denied
defendant's petition for new trial, the journal
record thereof being as follows, to wit:

In the District Court of the United States in and
for the District of Montana.

No. 1031.

E. J. FIFER

vs.

THE FRANZ CORPORATION.

Order Denying Defendant's Petition for New Trial.

This cause came on regularly for hearing this day on defendant's motion for a new trial and settlement of the bill of exceptions, S. C. Ford, Esq., appearing for the plaintiff and John G. Brown, Esq., appearing for the defendant.

Thereupon the bill of exceptions was agreed upon by counsel, and settled and allowed by the Court.

Thereupon the motion for new trial was argued by counsel and submitted to the Court, and, after due consideration, the Court ordered that said motion for new trial be and is denied.

Entered in open court August 7th, 1923.

C. R. GARLOW,
Clerk. [128]

Thereafter on August 10, 1923, petition for writ of error was filed herein, being in the words and figures following, to wit:

In the District Court of the United States for the
District of Montana.

Case No. 1031.

E. F. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION,

Defendant.

Petition for Writ of Error.

Comes now the Frantz Corporation, the defendant above named, and shows:

That under date of June 24, 1923, there was entered in the above-entitled and styled Court and cause a judgment in favor of the plaintiff, E. F. Fifer, and against defendant, The Frantz Corporation, the said judgment being in the amount of Thirty-five Hundred Dollars (\$3,500.00), with costs; in which said judgment and the proceedings had prior thereto in this cause certain manifest errors were committed to the grievous prejudice of this defendant, all of which will appear more in detail from the assignment of errors filed with this petition.

WHEREFORE, defendant feeling aggrieved by said judgment petitions and prays this Court for an order allowing said defendant to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided for the correction of errors so complained of; that an order be made fixing the amount of supersedeas bond in this case; and that a transcript of the records, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

And the defendant herewith submits his assignment of [129] errors in accordance with the rules of the United States Circuit Court of Appeals and the course and practice of this honorable Court.

And your petitioner will ever pray.

C. J. MARSHALL, STEWART & BROWN,
Attorneys for Defendant.

Filed Aug. 10, 1923. C. R. Garlow, Clerk. [130]

Thereafter on August 10, 1923, assignment of errors was filed herein, being in the words and figures as follows, to wit:

In the District Court of the United States for the
District of Montana.

E. F. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION,

Defendant.

Assignment of Errors.

Defendant above named, plaintiff in error, in connection with his petition for writ of error herein, specifies the following particulars wherein error was committed in this case:

I.

That upon the trial of said cause the verdict of the jury rendered therein is excessive and appears to have been given under the influence of passion and prejudice.

II.

That the evidence is insufficient to justify the verdict rendered and judgment entered thereon, or

any verdict or judgment herein, among others in the following particulars:

a. It appears from the evidence submitted in the case that the defendant's right of entry upon said premises was under written contract, or agreement, and that all of the damages claimed by the plaintiff, and to which evidence was offered was due to and approximately caused by causes that were expressly relieved and excused from by the agreement of the parties.

b. From all of the evidence introduced upon the trial of this case it appears that the injuries, if any, that the plaintiff sustained to his land and premises were due to and approximately caused by causes, some of which were from defendant's action, some of which were by the action of others, [131] and most of which were by action on the part of the defendant, damages for which had been expressly waived by the plaintiff by the lease agreement existing between the parties. From the evidence it cannot be ascertained whether or not the damage was due to causes for which the defendant might be responsible, or causes for which he would not be responsible, and there is such a confusion in evidence that it would seem insufficient or lack of proof on the part of the plaintiff and failure to prove his case as laid.

c. The evidence is wholly insufficient to sustain a verdict in the amount awarded by the jury, in that there is no proof to justify such a sum in damages.

III.

Errors at law occurring at the trial, which said errors at law are as follows:

a. The Court erred in permitting testimony to be introduced with a view to showing damages as to the structures, to wit, pumping plant, pipe-lines, water-lines, and telephone lines upon the premises, to which evidence timely objections were made by the defendant, and by the Court overruled, defendant preserving its objections by exception.

b. The Court erred in permitting testimony to be introduced relative to roads built upon said premises, or used thereon upon the ground and for the reason that the building and use of roads upon said premises was authorized by the lease agreement between the parties and a necessary incident thereto, to which evidence timely objections were made by the defendant, and by the Court overruled, defendant preserving its objections by exception.

c. The Court erred in refusing to strike out the witness' answer to the following question:

“Q. What was the value of your entire tract of land prior to the entry by the Frantz Corporation? [132]

“A. I have been offered seventy-five dollars an acre for it all the way through.” (Tr., page 15.)

d. The Court erred in permitting testimony relative to the damages by loss of crop of sweet clover, to which evidence timely objections were made by the defendant, and by the Court overruled, defendant preserving its objections by exception.

e. The Court erred in permitting witness, Al. Dixon, to answer the following question:

“Q. What, in your judgment, is the value of the land since those instrumentalities have been placed upon the property?” (Tr., 27.)

f. The Court erred in refusing to allow the witness, Lantz, to testify as to what road was first used when the oil development first started, and in sustaining the plaintiff's objection to that testimony. (Tr., 55.)

g. The Court erred in sustaining the plaintiff's objection to the following question asked of witness Lantz:

“Q. Now, this hauling in, was that done by contract on a per pound basis, or did you do the hauling yourself?” (Tr., 55.)

h. The Court erred in permitting the following question to be answered by the witness Sonntag:

“Q. What was the cost of that pumping station?” (Tr., 65, 66.)

i. The Court erred in permitting the following question to be answered by the witness Sonntag:

“Q. How many wells have been drilled across the river by the Frantz Corporation where the road through the Fifer tract was used in the hauling of material?” (Tr., 66.)

j. The Court erred in sustaining plaintiff's objection to the following question asked the witness Sontagg:

“Q. Have you had occasion to rent the surface-right privileges for use similar to what you

have here under substantially similar conditions as are in existence on the Fifer tract?" [133] and in sustaining plaintiff's objection to the following question asked the same witness:

"Q. From your experience, operating under conditions similar to those on the Fifer tract, what would you say was a fair rental value for the use of the Fifer tract for the use you have put it to?"

and the Court erred in sustaining the plaintiff's objection to the defendant's written offer of proof which is in words and figures as follows, to wit:

"We offer to prove by the witness on the stand, L. F. Sontag, that he is experienced in the renting of similar lands to the Fifer lands for surface use purposes such as the Frantz Corporation is making of the lands here in controversy, and that a reasonable rental value of such lands for the purposes such as the Frantz Corporation is making of these lands is One Hundred Dollars per year."

"Mr. FORD.—To which plaintiff objects on the ground that the witness has not shown himself qualified, and from his testimony it appears that his experience in the renting of land was not had in or near the land in controversy, but, on the contrary, was had in adjoining states; and for the further reason that the rental value of said land for oil and gas mining purposes is not a material issue in this case."

"The COURT.—The offer is denied and exception may be noted." (Tr., 69, 70.)

k. The Court erred in sustaining plaintiff's objection to the question asked of the witness Hilger relative to the value of the alfalfa hay in Fergus County, Montana, during the years 1920, 1921 and 1922. (Tr., 76, 77.)

l. The Court erred in sustaining plaintiff's objection to the following question asked of the witness Downing:

“Q. From your knowledge and from the number of visits you have made there, are these assumptions real or mythical, as given you by Mr. Ford?” (Tr., 82.)

IV.

The Court erred in refusing defendant's motion for directed verdict.

V.

The Court erred in its instructions to the jury in such portions of the instructions as exception was taken to by the defendant, [134] which objections and exceptions are as follows:

Are there any exceptions for the plaintiff?

Mr. FORD.—No exceptions.

The COURT.—Any for the defendant?

Mr. BROWN.—Defendant excepts to that portion of the Court's instruction which leaves out the oil lines as one of the permanent structures.

We except to that portion of the instruction which says they are liable for the destruction of crops, no matter whether necessary for the taking of oil from these lands or not, for if the taking was necessary it would be out of the lease.

We except to that portion of the instruction which says that they are not justified in using this land in connection with the development of any other, for the reason that the evidence shows that there might be, in case of operation and to facilitate development, conditions, under which this would inure to the land in question.

We object to the consideration by the Court in its instructions of the damage to the fences *in toto* as coming from the acts of this defendant, and its instruction, for the reason that the evidence shows that there may have been damage to fences from other outside or independent operators, and the jury are entitled to consider whether or not this was from this defendant or was from trespassers, and except to the Court's instruction to fix responsibility entirely upon the defendant and no other.

The COURT.—Let me interrupt you right there; that is grossly wrong. The Court told the jury that if they can point out to any destruction by others, this defendant is not liable for it, the defendant is only liable for the destruction of the fence so far as he destroyed it.

Mr. BROWN.—I did not mean to misquote. What I mean is the question of confusion as to who caused it.

The COURT.—Yes, proceed.

Mr. BROWN.—And the defendant excepts to that portion of the instruction which allows the jury to consider the question of the destruction of the fences being entirely upon this defendant, or

possibly upon it, for the reason that there is confusion upon the issue and no sufficient proof on which the cause should be submitted to the jury.

The defendant excepts to that portion of the instruction that gives as a measure of damages to land the value of the land before and the value of the land after, and also gives a measure of damages for fences and for loss of crops, in that there cannot be three rules of damages, to wit, a general loss and destruction of the land and also a general loss and destruction of its appurtenances; that there can be but one rule, and that must be either the value of the things destroyed or lessened value in the property itself, and the instruction as given is not a correct rule of damages as applied in this case. [135]

VI.

The Court erred in denying the defendant's petition for new trial.

WHEREFORE the defendant prays that his petition for writ of error be granted and that for the reasons aforesaid and for divers and sundry other reasons the judgment entered herein as of June 24, 1923, shall be reversed.

C. J. MARSHALL,
STEWART AND BROWN,
Attorneys for Defendant, now Plaintiff in Error.

Filed Aug. 10, 1923. C. R. Garlow, Clerk. [136]

Thereafter, on August 10, 1923, order allowing writ of error was signed and filed herein, which is in the words and figures as follows, to wit:

In the District Court of the United States for the
District of Montana.

E. F. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION,

Defendant.

Order Allowing Writ of Error.

At a stated term, to wit, the April term for the year 1923 of the United States District Court for the District of Montana, on August 10, 1923, came the defendant herein by its attorneys, C. J. Marshall and Stewart and Brown, and filed and presented its petition praying for the allowance of a writ of error to be by it prosecuted for a review in the United States Circuit Court of Appeals for the Ninth Circuit of the judgment heretofore entered in this cause in favor of the plaintiff, E. F. Fifer, and against the defendant, The Frantz Corporation, under date of June 24, 1923; and at the same time prayed for an order fixing the amount of supersedeas bond herein and directing the transmission of the records, papers, exhibits and proceedings herein, properly authenticated, to said Circuit Court of Appeals.

On consideration of said petition and of said assignment of errors the Court does hereby allow the

writ of error prayed for and does fix the amount of the supersedeas bond in the sum of Five Thousand Dollars (\$5,000.00), which bond when given and approved shall operate as a supersedeas.

It is further ordered that the clerk of this Court prepare, properly authenticated, and transmit to the Circuit Court of Appeals for the Ninth District aforesaid a record of the proceedings [137] had and done herein, including all papers and evidence offered.

BOURQUIN,

Judge of the District Court of the United States
in and for the District of Montana.

Filed Aug. 10, 1923. C. R. Garlow, Clerk. [138]

Thereafter, on Aug. 10, 1923, bond on writ of error was approved, and filed herein, which is in the words and figures as follows, to wit:

In the District Court of the United States for the
District of Montana.

E. F. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION,

Defendant.

Supersedeas Bond On Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That the Frantz Corporation, as principal, and the National Surety Company, a surety company duly

authorized to act as surety upon bonds in the State of Montana and in the courts of the United States, including those in the Ninth Circuit, are held and firmly bound unto E. F. Fifer, plaintiff above named, in the full and just sum of Five Thousand Dollars (\$5,000.00), to be paid to E. F. Fifer, plaintiff as aforesaid, his certain attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves and our successors in interest and assigns jointly and severally by these presents.

Dated at Helena, Montana, this 10th day of August, 1923.

The condition of this obligation is such that whereas, lately, at a District Court of the United States for the District of Montana, in a suit pending in said court between the said plaintiff, E. F. Fifer, and the said defendant, The Frantz Corporation, a judgment was rendered in favor of the plaintiff and against the defendant under date of June 24, 1923, and said defendant having thereafter obtained a writ of error and filed a copy thereof in the office of the clerk of said court, to reverse and set aside said judgment aforesaid, and a citation directed to said E. F. Fifer, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, State of California, on the 9th day of [139] Sept. 1923 next;

NOW, THEREFORE, if said defendant shall prosecute said writ of error to effect, and answer all

damages and costs if he fails to make his plea good, then this obligation shall be void; otherwise to remain and be in full force and virtue.

THE FRANTZ CORPORATION.

By John T. Brown,
Its Attorney Hereto Duly Authorized.
NATIONAL SURETY COMPANY.

By John T. Brown,
Resident Vice-President.

Attest: [Seal]

WM. E. ASHTON,
Assistant Secretary.

Approved:

BOURQUIN, J.

Filed Aug. 10, 1923. C. R. Garlow, Clerk. [140]

Thereafter, on August 10, 1923, a citation was duly issued herein, which original citation is hereto annexed, and is in the words and figures as follows, to wit: [141]

In the District Court of the United States for the
District of Montana.

E. F. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION,

Defendant.

Citation on Writ of Error.

United States of America,
District of Montana,—ss.

The President of the United States to E. F. Fifer,
GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, California, on the 9th day of September, 1923 next, pursuant to a writ of error filed in the office of the Clerk of the District Court of the United States for the District of Montana, wherein The Frantz Corporation, defendant in said District Court, is plaintiff in error, and you, the said E. F. Fifer, plaintiff in said District Court, are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in this behalf.

Given under my hand at Helena, Montana, on this 10th day of August, 1923.

BOURQUIN,
United States District Judge for the District of
Montana.

Due personal service of the foregoing citation made and admitted and receipt of copy thereof together with copy of the petition for writ of error,

assignments of error and order allowing writ of error acknowledged this 10th day of August, 1923.

FORD & CHOATE,

Attorneys for Plaintiff in Said District Court and
Defendant in Error Herein. [142]

[Endorsed]: #1031. In the District Court of the United States for the District of Montana. E. F. Fifer, Plaintiff, vs. The Frantz Corporation, Defendant. Citation on Writ of Error. Filed Aug. 10, 1923. C. R. Garlow, Clerk. [143]

Thereafter, on August 10, 1923, writ of error was duly issued herein, which original writ of error is hereto annexed, and is in the words and figures following, to wit: [144]

In the District Court of the United States for the
District of Montana.

E. F. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION,

Defendant.

Writ of Error.

United States of America,
District of Montana,—ss.

The President of the United States, to the Honorable, the District Court of the United States for the District of Montana, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is

in said District Court before you or some of you, between E. F. Fifer, as plaintiff, and The Frantz Corporation, as defendant, a manifest error hath happened, to the great damage of said defendant, as by its petition and assignment of errors appears, we, being willing that error, if any there hath been, shall be duly corrected, and full and speedy justice done to the party aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ so that you have the same in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, in said Circuit, on the 9th day of September, 1923, next, within thirty days hereof, to be then and there held, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further [145] to be done therein to correct the error what of right and according to the laws and customs of the United States should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, and the seal of the District Court of the United States for the District of Montana, this 10th day of August, 1923, and in the one hundred and forty-eighth year of the Independence of the United States of America.

[Seal]

C. R. GARLOW,

Clerk of the District Court of the United States for
the District of Montana.

Service of the foregoing writ of error is hereby admitted this 10th day of August, 1923.

FORD & CHOATE,
Attorneys for Plaintiff. [146]

In the District Court of the United States for the
District of Montana.

E. F. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION,

Defendant.

Answer of Court to Writ of Error.

The answer of the Honorable, the United States District Judge for the District of Montana, to the foregoing writ.

The record and proceedings whereof mention is made, with all things touching the same, I certify under the seal of the said District Court, to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to which this writ is annexed, as within it I am commanded.

By the Court.

[Seal]

C. R. GARLOW,

Clerk. [147]

[Endorsed]: #1031. In the District Court of the United States for the District of Montana.

E. F. Fifer, Plaintiff, vs. The Frantz Corporation,
Defendant. Writ of Error. Filed Aug. 11, 1923.
C. R. Garlow, Clerk. [148]

Thereafter, on August 11, 1923, praecipe for transcript on writ of error was filed herein as follows:

In the District Court of the United States for the
District of Montana.

E. F. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION,

Defendant.

Praecipe for Transcript of Record.

To C. R. Garlow, Esq., Clerk of the United States
District Court Above Named:

Dear Sir:

You will kindly prepare and certify to a transcript of record on appeal from the judgment rendered and entered in the above-entitled cause, under date of June 24th, 1923, the papers required therefor being the following:

1. Complaint of plaintiff.
2. Summons with return of service.
3. Answer of defendant.
4. Reply of plaintiff.
5. Verdict of jury.
6. Judgment.

7. Petition for new trial.
8. Bill of exceptions.
9. Exhibits introduced in evidence in said case.
10. Opinion and order of Court denying motion for new trial.
11. Petition for writ of error.
12. Assignment of errors.
13. Order allowing writ of error and fixing amount of supersedeas bond. [149]
14. Writ of error.
15. Citation on writ of error.
16. Supersedeas and cost bond.
17. Answer to writ of error.

Dated this 11th day of August, 1923.

C. J. MARSHALL,
STEWART and BROWN,
Attorneys for Defendant and Plaintiff in Error.

Filed Aug. 11, 1923. C. R. Garlow, Clerk. [150]

**Certificate of Clerk United States District Court
to Transcript of Record.**

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 150 pages, numbered consecutively from 1 to 150, in-

clusive, is a full, true and correct transcript of the record and all proceedings had in said cause, and of the whole thereof, required to be incorporated in said transcript of record by the praecipe of the plaintiff in error, as appears from the original files and records of said court in my custody as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation and writ of error issued in said cause.

I further certify that there is transmitted with this transcript, by order of the court, all original exhibits introduced at the trial of said cause, to wit: Plaintiff's Exhibits Nos. 1 and 2 and Defendant's Exhibits Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15.

I further certify that the costs of the transcript of record amount to the sum of Sixty-three and 50/100 Dollars (\$63.50), and have been paid by the plaintiff in error.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Helena, Montana, this 28th day of August, A. D. 1923.

[Seal]

C. R. GARLOW,

Clerk. [151]

[Endorsed]: No. 4090. United States Circuit Court of Appeals for the Ninth Circuit. The Franz Corporation, a Corporation, Plaintiff in Error, vs. E. J. Fifer, Defendant in Error. Transcript of

Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed August 31, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No.

United States
Circuit Court of Appeals

For the Ninth Circuit

THE FRANTZ CORPORATION, a Corporation,
Plaintiff in Error,

VS.

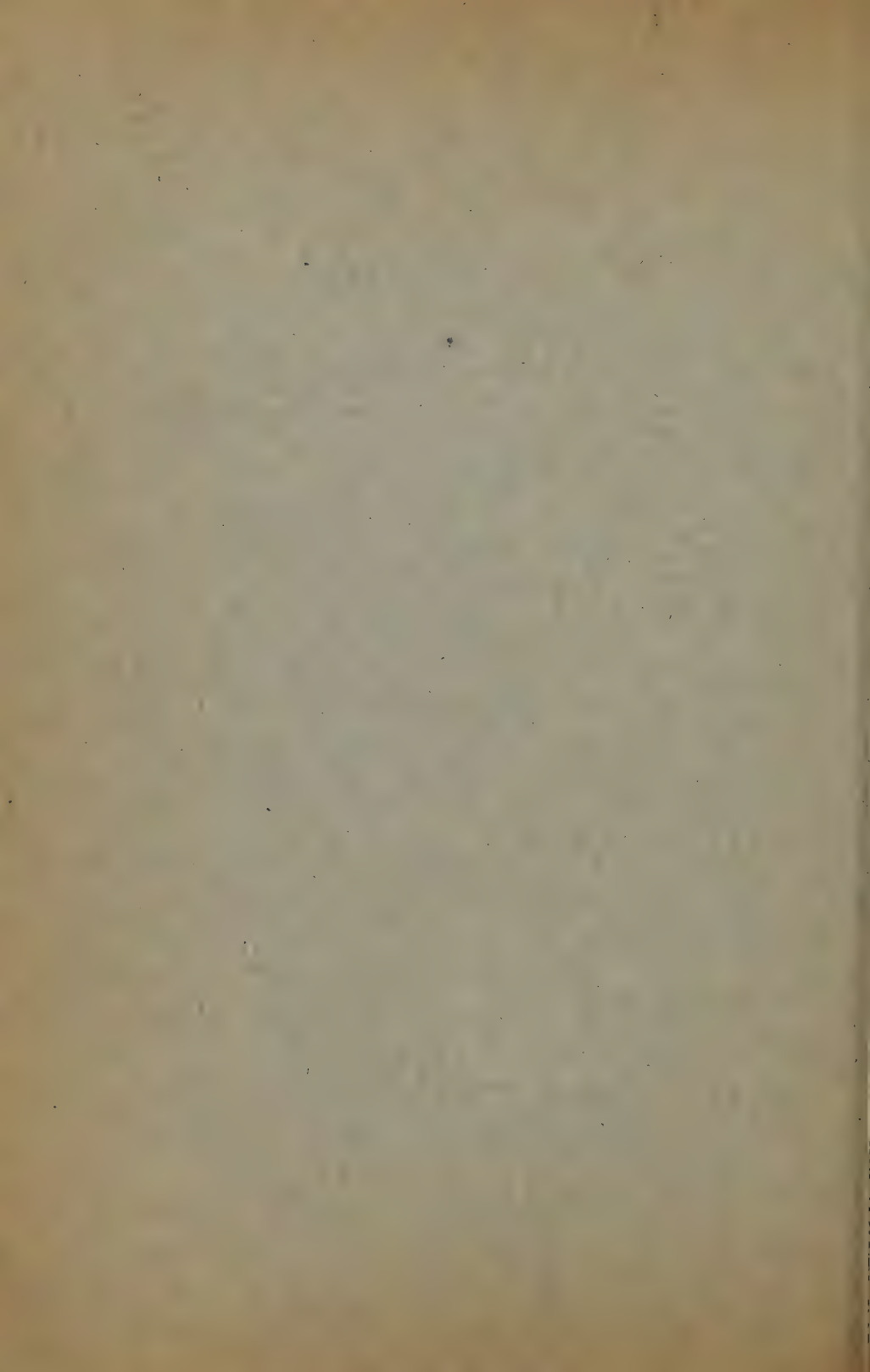
E. J. FIFER,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

C. J. MARSHALL,
STEWART & BROWN,
Attorneys for Plaintiff in Error.

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United States
Circuit Court of Appeals

For the Ninth Circuit

THE FRANTZ CORPORATION, a Corporation,
Plaintiff in Error,

VS.

E. J. FIFER,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

STATEMENT

On June 13th, 1922, E. J. Fifer, defendant in error, filed an action against the Frantz Corporation, plaintiff in error, claiming Ten Thousand (\$10,000.00) Dollars damages to his property and business of stock raising and farming on account of claimed trespassing on the part of the Frantz Corporation on grounds which he owned and the Frantz Corporation had leased for oil and gas production. He specified his damages as \$2,500.00 per annum for pasturage, \$1,200.00 (?) for fences, \$4,000.00 for pipe lines, roads, etc., and to his farming and stock raising business \$2,500.00. The complaint sets forth as "Exhibit A" the oil and gas lease, under which the corporation had entered upon the

premises. It alleges that the corporation went beyond the rights given in the lease, and that the damages were the results of going beyond these rights. The lease becomes important, but we shall discuss it later in connection with the pleadings.

Issue was joined by answer and reply thereto and trial had on June 24th, 1923 in the District Court of the United States in and for the District of Montana. The trial resulted in a verdict for defendant in error for \$3,500.00 damages (Tr. 21). Upon this verdict judgment was duly entered (Tr. 22); petition for new trial was filed (Tr. 23) and thereafter denied (Tr. 159). Petition for Writ of Error (Tr. 160), and assignment of errors (Tr. 161) were filed and order made allowing the Writ (Tr. 169); Bond furnished (Tr. 170) and citations (Tr. 173) and Writ (Tr. 174) issued.

PLEADINGS.

The complaint (Tr. 2) alleges the residence of the parties, the corporate existence of the corporation and the amount in controversy, and that the defendant in error was the owner of the lands in question. These allegations are admitted in the answer. (Tr. 15). It also alleges that the lands referred to consist of about "50 acres of first-class irrigated land, capable of producing large crops of hay and grain; and 30 acres of dry land under cultivation and capable of producing the crops commonly raised in the State of Montana upon lands

of that character and 80 acres of first-class grazing land.” (Tr. 3). This is denied in the answer. (Tr. 15). The complaint then alleges “that on the 26th day of September 1919 that the plaintiff and one Frank Frantz entered into a certain oil and gas lease under the terms of which the land described was granted and leased to the said Frank Frantz for the purpose of mining and operating for oil and gas, the laying of pipe-lines and building of tanks, power stations, and structures thereon, to produce, save and take the said products.” (Tr. 3). It refers to the lease and sets it forth as “Exhibit A.” The answer admits the existence of the lease and the corporation succeeding to the rights and obligations thereunder. The lease (Tr. 8-12) does not differ greatly from the usual oil and gas lease. It is upon a royalty basis with rental obligations when drilling operations are not carried on. It lets the premises “for the sole and only purpose of mining and operating for oil and gas, *laying of pipe-lines, and building tanks, power stations and structures thereon, to produce, save and take care of*” the oil and gas produced. It gave the right to remove machinery and fixtures, including the right to draw casing. It also contained a provision that it was understood and agreed that “all taxes and assessments levied against *said land*, or the production therefrom shall be paid by the respective parties in the proportion of the interest of each in the production from said land, that is one-eighth

(1/8) by the lessor and seven-eighths (7/8) by the lessee.” After the printed portion it contained the following clause “Lessee further agrees to pay to the lessor any damages caused to growing crops, fences, or other damages upon said premises, by the lessee or lessee’s agent.” (Tr. 12). It is upon this portion of the lease the action is predicated.

The complaint goes on (Par. 8 Tr. 4) and alleges that in January 1920 entering upon the authority of the lease the “defendant opened and tore down part of the fences of plaintiff enclosing said lands, established roads over, upon and across said lands, built pipelines thereon, constructed telephone lines, built tanks, power and pumping stations, for the purpose of caring for and handling the production of oil produced upon lands other than those of the plaintiff, and built a water pumping station to supply water for its other operations in the field as well as to other persons.” (Tr. 4). That for many years prior to this time (Par. 9) the plaintiff was engaged in the successful and profitable general farming and stock raising business upon the premises. That he had it properly fenced, describing the fence, (Tr. 4-5). These allegations are denied with some qualification in the answer, (Par. 3, Tr. 16), the answer alleging that whatever it did in the way of opening fences, or establishing roads, or building of pipe-lines, was done for the purpose of handling the production of oil produced upon the lands of the plaintiff, and that it was all done to

the benefit of the plaintiff and with his knowledge and consent. It denies that there were any trespassing or acts committed not within the terms of the lease.

The complaint also alleges that in addition to the operations upon the plaintiff's land authorized by the lease the corporation conducted extensive oil and gas operations on land adjoining and in that vicinity and that the operations "so conducted upon plaintiff's said lands were incident to and a part of defendant's general operations," and in the conduct of its general operations the corporation made use of its right to enter upon the lands in question (Par. 10 Tr. 5). This allegation is admitted in the answer with allegations of lease authority so to do. (Tr. 15.) The complaint then alleges that by reason of the breaking down of the fences and the opening up of the roads the protection of the premises against "range cattle and stock was wholly destroyed, and such animals ate up and destroyed the grasses, growing crops and vegetables, depriving the plaintiff of the use of his lands for farming and stock raising purposes," so that he was compelled to abandon them in the spring of 1920, and he has since abandoned them, save and except that in 1920 he cut a partial crop of hay consisting of about 45 tons off of a portion of the lands (Par. 11, Tr. 5-6). The damages are then itemized (we do not vouch for the mathematics), specifying \$2,500.00 per annum for pasturage, \$1,200.00 for

fences, \$4,000.00 for pipe-lines, telephone lines, tanks, power stations and other structures and roads on the lands and \$2,500.00 for the damage to the business of farming and stock raising, then alleging a total of \$10,000.00. (Par. 12, Tr. 6.) This allegation is specifically denied in the answer (Tr. 17). The answer further alleges another action pending between the same parties covering the same subject matter in the State Court of Montana in Fergus County (Tr. 17). It might be noted that this plea was practically abandoned. To this plea reply was filed by the plaintiff denying it. Upon these pleadings issue was joined and trial had.

EVIDENCE.

In Fergus County, Montana, in 1919 there was discovered a new field known as the Cat Creek Oil Field. The field is 25 or 30 miles from the nearest railroad station of Winnett. One of the first discoveries in the field was made by the plaintiff in error here upon the lands here in question. The defendant in error was the owner of about 160 acres of land as a ranch. He entered it some years ago and obtained his patent prior to the lease here in question. The corporation came out upon the lands in October 1919. At the time they came there the lands were enclosed by a fence. A road ran north of the property and then down through to the south in the vicinity of the ranch house of the owner,

and this road was used in the early development (Tr. 90).

The oil development consisted of drilling a well on the Charles tract just south and drilling of the Fifer No. 1 on the land in question. There is no dispute that in the early development there was no breaking down of fences or general use of this road. There was also a road which came in from the northwest and crossed the lands in question running diagonally from the northwest to the southeast. On the tract itself this road had two branches, one going northerly to the Fifer No. 2 and the Montacal Wells (Montacal being a sublease under the lease here in question), and one road going southwesterly and on off of the property.

The testimony is undisputed that the roadway the corporation used, to-wit, the one from northwest "was used all the time we were working, and I drove over the trail once before we started in company with Mr. Leavitt. The gates at either end of this field were kept closed, so far as the Frantz Corporation and its operations were concerned, *until the stampede came*. When that happened they were down. There were a large number of operators and a large number of people going through." (Tr. 95.) In other words what happened was there came the to be expected stampede with the discovery of oil in a new field. It is also undisputed that after the stampede came the fences in the vicinity

of the entrances to the land were broken down and destroyed. The exact extent of the breaking down and the destruction is susceptible of exact calculation and measurements by reason of the fact that the map "Exhibit 5" is not questioned or disputed as to its accuracy in showing this. The roads were new and largely cattle trails, so that as they became muddy or impassable for other reasons teams of the corporation or its contractors, and the teams of others (approximately nine other operators Tr. 115) would swing in and out from the regular road and in doing so widened the break in the fences. The operations became so extensive that this northwest to southwest highway was built up for a main travelled highway, and has been since maintained as such. There is some proof in the record that it was a highway before, but upon this there is a disputed question of fact.

In the development of the field it became necessary to have water. Pipe lines were accordingly laid from lands leased by the corporation on the south and conveyed in, on and to the Fifer land. It also became necessary and incident to the development to have telephone lines. These were installed on the land as required.

In order to convey the oil out it was necessary to first assemble the oil from the different wells to a central plant, and then from this plant pump it to the railroad station at Winnett. These assembling lines were by gravity. The oil was assembled

on the Fifer tract. The pumping lines were by force. A pumping station was located on the Fifer land to pump on out to Winnett. All this is shown on "Exhibit 5." It is true that there was a water line going from the outside in to the Fifer tract, but the testimony shows this would be necessary for the Fifer development. It may or may not be true that there were water lines going from the Fifer tract out, but there is no direct proof upon this as a separate element of damage.

Unquestionably and beyond dispute this main road was used to haul materials to other developments, but not until it had first been used in the Fifer development. The testimony is undisputed that the fences were kept up until the stampede came and equally undisputed that after the stampede came the general use by the public made it impossible to keep them up.

The pumping plant of the corporation erected upon the lands in question was a combination plant where water and oil were pumped in the same station. It was thus installed for reason of economy and efficient operation. Water lines were all buried beneath the surface; the oil lines and telephone lines are above the surface. These all show on the map "Exhibit 5."

It is undisputed that this equipment of pumping station for water and oil and these lines for conveying water and oil, or at least the trunk lines, were used for the conveying of the oil and water

incident to the corporation's development on adjacent lands (however it must be noted that the so-called camp of the corporation was not located upon the lands in question. That was to the south).

As to the character of these pumping stations and pipe lines, and telephone lines, their construction, size and use, the testimony is undisputed. The defendant in error offered no evidence here whatever, so we are confined to an examination of the testimony of witnesses Landz (Tr. 89) and Sontag (Tr. 105).

From these two witnesses' testimony it is found that "the pumping station and power house were an essential part of the development on the Fifer lease, if we had no other (lease) it would be necessary to the taking oil out and getting it to the delivery point, and the same would be true of the water lines with this respect, we could have put in a different system * * * , but the size of the line would have been the same, (Tr. 94, l. 30), and "assuming that we had but the one lease (Fifer) and eliminating the Brown and Charles and the other it would have been necessary for us to have installed the pump to have handled the Fifer in the manner we did." (Tr. 93, l. 6). "The oil lines are laid on the surface and they would be just the same relative to Fifer whether we had Fifer alone, or O'Neil, Brown and Charles (oil) in them." Tr. 93, l. 24.)

"I think this power station would have been con-

structed for the purpose of taking care of the Fifer production * * *. I think we would have constructed this pumping station for the production of the Fifer lands along. IT WOULD TAKE JUST AS LARGE A STATION TO PUMP 100 BARRELS A DAY AS IT WOULD TO PUMP A THOUSAND BARRELS A DAY.” (Tr. 102, l. 2-7.)

“These oil lines that were put in to handle the Fifer production were not increased * * *. They would be identical for handling the Fifer production as though they handled several places in that vicinity.” (Tr. 113, l. 1.) A pumping operation was necessary in the Fifer tract to get the oil produced from the Fifer tract to market. THE PUMP INSTALLED WAS THE SIZE NECESSARY FOR THE HANDLING OF THE FIFER PRODUCTION AS IT CAME TO US, * * *. The telephone was necessary for the handling of the Fifer production, if we had had no other.” (Tr. 113, l. 10.)

This testimony is undisputed. The installation of pumping plant for water and oil, pipe lines for water and oil, and telephone, while all used for and in connection with other production, is identical with what was contemplated or would be necessary had it been for the Fifer lease alone. It is also undisputed that one road, to-wit, one to the north and to the so called Montacal property was used exclusively for Fifer land operations; also

that all of the materials used for the pumping stations, pipe lines, etc. necessary to the Fifer development are the materials that were hauled in over the roads in question; also that there were a number of other operators in the field (Tr. 114, l. 31), and that the roads in question were used by other operators and by the public generally in the stampede. (Tr. 95, l. 19.)

The defendant in error by himself and some neighbors offered testimony as to the character of the land in question, its value as a ranch, and its productiveness for alfalfa and other purposes, and the value of its production and pasturage, and the value of the fences. (Tr. 33, Tr. 62, Tr. 71.)

Upon this phase of the case plaintiff in error offered the testimony of an older timer of that country, Mr. Hilger, (Tr. 124) and a well known real estate man, Mr. Downing. (Tr. 134.) It also offered photographs showing the land in question and conditions generally, and in addition to this the legend of the map as to the character of the land is undisputed and the map was admitted without objection. (Tr. 83.) Of course, upon this issue as to value of land, its pasturage, value of crops produced, and cost of construction of fences, etc. we assume this court will doubtless be confronted with the decision of the jury upon a disputed fact issue.

ASSIGNMENTS OF ERROR.

(Tr. 161.)

The plaintiff's in error assignment of errors will, of course, be found in the transcript but for the sake of convenience we repeat them here. They are:

I.

That upon the trial of said cause the verdict of the jury rendered therein is excessive and appears to have been given under the influence of passion and prejudice. (Tr. 24.)

II.

That the evidence is insufficient to justify the verdict rendered and judgment entered thereon, or any verdict or judgment herein, among others in the following particulars:

a. It appears from the evidence submitted in the case that the defendant's right of entry upon said premises was under written contract, or agreement, and that all of the damages claimed by the plaintiff, and to which evidence was offered was due to and proximately caused by causes that were expressly relieved and excused from by the agreement of the parties.

b. From all of the evidence introduced upon the trial of this case it appears that the injuries, if any, that the plaintiff sustained to his land and premises were due to and proximately caused by causes, some of which were from defendant's ac-

tion, some of which were by the action of others, and most of which were by action on the part of the defendant, damages for which had been expressly waived by the plaintiff by the lease agreement existing between the parties. From the evidence it cannot be ascertained whether or not the damage was due to causes for which the defendant might be responsible, or causes for which he would not be responsible, and there is such a confusion in evidence that it would seem insufficient or lack of proof on the part of the plaintiff and failure to prove his case as laid.

c. The evidence is wholly insufficient to sustain a verdict in the amount awarded by the jury, in that there is no proof to justify such a sum in damages. (Tr. 245.)

III.

Errors at law occurring at the trial, which said errors at law are as follows:

a. The Court erred in permitting testimony to be introduced with a view to showing damages as to the structures, to wit, pumping plant, pipe-lines, water-lines, and telephone lines upon the premises, to which evidence timely objections were made by the defendant, and by the Court overruled, defendant preserving its objections by exception.

b. The Court erred in permitting testimony to be introduced relative to roads built upon said premises, or used thereon upon the ground and for

the reason that the building and use of roads upon said premises was authorized by the lease agreement between the parties and a necessary incident thereto, to which evidence timely objections were made by the defendant, and by the Court overruled, defendant preserving its objections by exception.

c. The Court erred in refusing to strike out the witness' answer to the following question:

“Q. What was the value of your entire tract of land prior to the entry by the Frantz Corporation?

“A. I have been offered seventy-five dollars an acre for it all the way through.”

(Tr. pp. 51-52.)

d. The Court erred in permitting testimony relative to the damages by loss of crop of sweet clover, to which evidence timely objections were made by the defendant, and by the Court overruled, defendant preserving its objections by exception.

e. The Court erred in permitting witness, Al. Dixon, to answer the following question:

“Q. What, in your judgment, is the value of the land since those instrumentalities have been placed upon the property?” (Tr. pp. 67-68.)

f. The Court erred in refusing to allow the witness, Landz, to testify as to what road was first used when the oil development first started, and in sustaining the plaintiff's objection to that testimony. (Tr. p. 26.)

g. The Court erred in sustaining the plaintiff's objection to the following question asked of witness Landz:

"Q. Now, this hauling in, was that done by contract on a per pound basis, or did you do the hauling yourself?" (Tr. p. 104.)

h. The Court erred in permitting the following question to be answered by the witness Sonntag:

"Q. What was the cost of that pumping station?" (Tr. 118.)

i. The Court erred in permitting the following question to be answered by the witness Sonntag:

"Q. How many wells have been drilled across the river by the Frantz Corporation where the road through the Fifer tract was used in the hauling of material?" (Tr. 119.)

j. The Court erred in sustaining plaintiff's objection to the following question asked the witness Sonntag:

"Q. Have you had occasion to rent the surface-right privilege for use similar to what you have here under substantially similar conditions as are in existence on the Fifter tract?" (Tr. 122.)

and in sustaining plaintiff's objection to the following question asked the same witness:

"Q. From your experience, operating under conditions similar to those on the

Fifer tract, what would you say was a fair rental value for the use of the Fifer tract for the use you have put it to?" (Tr. 122.)

and the Court erred in sustaining the plaintiff's objection to the defendant's written offer of proof which is in words and figures as follows, to wit:

"We offer to prove by the witness on the stand, L. F. Sonntag, that he is experienced in the renting of similar lands to the Fifer lands for surface use purposes such as the Frantz Corporation is making of the lands here in controversy, and that a reasonable rental value of such lands for the purposes such as the Frantz Corporation is making of these lands is One Hundred Dollars per year.

"Mr. Ford—To which plaintiff objects on the ground that the witness has not shown himself qualified, and from his testimony it appears that his experience in the renting of land was not had in or near the land in controversy, but, on the contrary, was had in adjoining states; and for the further reason that the rental value of said land for oil and gas mining purposes is not a material issue in this case.

"THE COURT—The offer is denied

and exception may be noted.” (Tr. 123.)

k. The Court erred in sustaining plaintiff’s objection to the question asked of the witness Hilger relative to the value of the alfalfa hay in Fergus County, Montana, during the years 1920, 1921 and 1922. (Tr. 132.)

l. The Court erred in sustaining plaintiff’s objection to the following question asked of the witness Downing:

“Q. From your knowledge and from the number of visits you have made there, are these assumptions real or mythical, as given you by Mr. Ford?”
(Tr. 139, l. 5.)

IV.

The Court erred in refusing defendant’s motion for directed verdict.

V.

The Court erred in its instructions to the jury in such portions of the instructions as exception was taken to by the defendant, which objections and exceptions are as follows:

Are there any exceptions for the plaintiff?

“MR. FORD. No exceptions.

“THE COURT. Any for the defendant?

“MR. BROWN. Defendant excepts to

that portion of the Court's instruction which leaves out the oil lines as one of the permanent structures.

"We except to that portion of the instruction which says they are liable for the destruction of crops, no matter whether necessary for the taking of oil from these lands or not, for if the taking was necessary it would be out of the lease.

"We except to that portion of the instruction which says that they are not justified in using this land in connection with the development of any other, for the reason that the evidence shows that there might be, in case of operation and to facilitate development, conditions, under which this would inure to the land in question.

"We object to the consideration by the Court in its instructions of the damage to the fences in toto as coming from the acts of this defendant, and its instruction, for the reason that the evidence shows that there may have been damage to fences from other outside or independent operators, and the jury are entitled to consider whether or not this was from this defendant or was from trespassers, and except to the Court's instruction to

fix responsibility entirely upon the defendant and no other.

“THE COURT. Let me interrupt you right there; that is grossly wrong. The Court told the jury that if they can point out to any destruction by others, this defendant is not liable for it, the defendant is only liable for the destruction of the fence so far as he destroyed it.

“MR. BROWN. I did not mean to misquote. What I mean is the question of confusion as to who caused it.

“THE COURT. Yes, proceed.

“MR. BROWN. And the defendant excepts to that portion of the instruction which allows the jury to consider the question of the destruction of the fences being entirely upon this defendant, or possibly upon it, for the reason that there is confusion upon the issue and no sufficient proof on which the cause should be submitted to the jury.

“The defendant excepts to that portion of the instruction that gives as a measure of damages to land the value of the land before and the value of the land after, and also gives a measure of damages for fences and for loss of crops, in that there cannot be three rules of damages, to wit, a general loss and destruction of the land

and also a general loss and destruction of its appurtenances; that there can be but one rule, and that must be either the value of the things destroyed or lessened value in the property itself, and the instruction as given is not a correct rule of damages as applied in this case." (Tr. 154, l. 6.)

VI.

The Court erred in denying the defendant's petition for new trial.

ARGUMENT.

The issues in the case at bar—when limited to oil and gas leases—are rather new. It has been difficult to find "pat" citations where similar facts have been before appellate courts.

We have here a lease that expressly provides for the entry upon the lands in question for the purpose which it was entered upon and used for. Expressly providing for "mining and *operating* for oil," also for the laying of pipe-lines, building tanks, power stations, and structures "*thereon.*" In the face of which express permission and such express purpose and object of the contract a suit is brought and *evidence* admitted of these very items, even their costs to the *Lessee* (Tr. 118) as elements of damages for the jury to consider. There is not one bit of proof in this case of anything being done by the plaintiff in error that was not either actually per-

mitted by the lease or clearly within the plain implication and intendment of such a contract or lease.

Later we shall, in order to avoid any question of abandonment of Assignments of Error, take up some of the assignments in detail. At the outset of the argument we would like to discuss this lease and the legal rules applicable to it. Such discussion necessarily involves Assignments of Error No. I, II, III-a-b-h-i, IV and portions of V.

An examination of counsels statement (Tr. 47, P. 1) the complaint and particularly of Paragraph 7 thereof (Tr. 3-4) and the oil lease here under discussion discloses that the action is sought to be maintained under the last clause of the lease which provides:

“Lessee further agrees to pay to the lessor any damages caused to growing crops, fences or other damages upon said premises by the lessee or the lessee’s agent.” (Tr. 12.)

Now it will be urged that an oil lease is to be strictly construed (contra to the general rule) against the lessee. We have examined with interest the cases holding to this rule of construction of oil leases and have found that without exception this rule has been adopted only as to production.

“Such leases being construed most strongly against the lessee and in favor of

the lessor, *owing to the peculiar nature of the mineral and the danger of loss to the owner from drainage by surrounding wells.*"

Huggins v. Daly, 99 Fed. 606;
Riles v. Gulf Etc. Co. (La.) 62 So. 623;
Superior Oil Etc. Co. v. Mehlin (Okla.)
108 Pac. 545;
Frank Oil Co. v. Belleview Etc. Co.
(Okla.) 119 Pac. 260.

Now, it is axiomatic that where the reason for the rule ceases the rule ceases.

Sec. 8739 Montana Revised Codes.

In this cause we have nothing involving the "peculiar nature of the mineral," or its "danger of loss," or its production involved. This is a straight action for damages to fences, lands, the business of farming, involving the use of property. Nothing peculiar about that to take it out of the recognized and approved rules of construction. It is unquestionably a case of ambiguity as between intent of a contract and specific terms and seeming conflict between terms within the contract. The ambiguity of the contract arising solely out of a clause *for the benefit of the lessor*—hence unquestionably by him.

"In cases of uncertainty not removed by the preceding rules the language of the contract should be interpreted most

*strongly against the party who caused the uncertainty to exist * * * .”*

Sec. 7545 Mont. Rev. Codes.

It might also be noted that the Montana Code provides for “all contracts” to be interpreted in the same manner. There is therefore no exception as to oil leases in Montana.

Sec. 7526 Mont. Rev. Codes.

Since this case and this lease have nothing about them requiring any exception to the rules of construction we would ask leave to apply them.

The Montana rules of construction are:

“Particular clauses in a contract are subordinate to its *general intent*.”

Sec. 7541 Mont. Rev. Codes.

“Repugnancies in a contract must be reconciled if possible by such an interpretation as will give some effect to the repugnant clauses, *subordinate to the general intent and purpose of the whole contract*.”

Sec. 7543 Mont. Rev. Codes.

“Words in a contract which are wholly *inconsistent with its nature or the main intention* of the parties are to be rejected.”

Sec. 7544 Mont. Rev. Codes.

“A contract must receive such an interpretation as will make it lawful, operative, definite, *reasonable* and capable of being carried into effect, if it can be done without violating the intention of the parties.”

Sec. 7534 Mont. Rev. Codes.

“Interpretation must be reasonable.”

Sec. 8771 Mont. Rev. Codes.

“One who grants a thing is presumed to grant also whatever is essential to its use.”

Sec. 8751 Mont. Rev. Codes.

The plain purpose, object and intent of the lease was to secure, produce and market mineral oil from these lands. Now, the usages of the business are commonly known and were known to the parties to this lease.

“When oil or gas is found in paying quantities it is not usual to consume it or reduce it to use at the wells, but it is conducted in iron pipes to large tanks or reservoirs, whence it is distributed by other pipes to the places of consumption, often many miles distant.

“These are matters within the common experience or knowledge of all men living

in those portions of the country where oil and gas are produced, and courts will take notice of whatever ought to be generally known within the limits of their jurisdiction.”

Brown v. Shipman, 155 U. S. 665 at 670.

“Even if the language of the agreement were doubtful and susceptible of two constructions, it would be our duty to give it that construction which would make it fair and such as prudent men would naturally execute in preference to one that would make it inequitable or such as reasonable men would not be likely to enter into.”

Withington v. Gypsy Oil Co. (Okla.) 172
Pac. 637;

Citing cases.

It is also a matter of both common knowledge and legal right that the right of ingress and egress goes with a lease, or license privilege, of land for mineral development purposes. Also that the appurtenances or machinery necessary to the development or the handling of the product must be located upon the land. Must occupy (trespass?) it. This of course goes to the general law of contract and the hiring of real property, but it is also peculiarly applicable here. The question of what is intended or implied in an oil and gas lease has most fre-

quently come up in suits to obtain or resist a forfeiture, usually for failure to use due diligence. So we use a case upon those facts. Of course the rule would be the same. A comparatively early and rather prominent case upon this is from the Court of Appeals of the Eight Circuit. In the consideration of the question of interpretation of an oil and gas lease the court said:

“Whatever is implied in a contract is as effectual as what is expressed. Implication is but another name for intention, and if it arises from the language of the contract when considered in its entirety, and is not gathered from the mere expectations of one or both of the parties, it is controlling. * * *

“The subject was, therefore, rationally left to the implication, necessarily arising in the absence of express stipulation, that the further prosecution of the work should be along such lines as would be reasonably calculated to effectuate the controlling intention of the parties as manifested in the lease, which was to make the extraction of oil and gas from the premises of mutual advantage and profit. * * *

“Whatever is necessary to the accomplishment of that which is expressly contracted to be done is part and parcel of the contract, though not specified.”

Brewster v. Lanyon Zinc So.
140 Fed.—801 at 809-10-11.

In this case we believe practically all the injury to the land was within the plain intent of the contract and the Court erred in permitting testimony as to the improvements (Assignments No. II and No. III a-b-h) and in its instruction in this regard (Assignment No. V.)

The only testimony in the case upon the question of the necessity of the use of the land by these improvements—or to put it another way the extent of the use by buildings, pipe-lines, etc., was from the witnesses Landz (Tr. 89) and Sontag (Tr. 105). As to the pumping of water and oil, also the pipe-lines and telephone these witnesses say:

“It was necessary to pump water in the Fifer tract to develop the Montacal (a Fifer area) and Fifer wells. * * *
It was necessary to bring the water to the Fifer tract for this development.”

(Witness Landz Tr. 92, l. 26-30.)

Witness Sontag goes into a more elaborate discussion of the use of water in drilling and later in the production of oil wells. He also explains the necessity and common practice of installing the oil and water pumps in the same building (Tr. 107). Testifies that all these water lines are underground (Tr. 108, l. 15.)

Next the pump house—

Upon this the Court permitted (over objection) evidence to be offered of the character of the foundation (cement Tr. 45, l. 13) and the *cost* thereof (Tr. 118, l. 15.) These two witnesses—(as we before stated the only evidence upon the subject)—both testify that the pump house was necessary to both drilling and pumping production, and that the two pumps in one building made for economy and of course reduced the extent of the trespass (?).

“I think this pumping station would have been constructed for the purpose of taking care of the Fifer production. *

* * I think we would have constructed this pumping station for the production of the *Fifer wells alone*.”

X Exam. Landz Tr. 102, l. 2 and 7.)

“The pumping station and power house was an essential part of the development on the Fifer lease, if we had had no other and (it?) would be necessary to the taking of the oil out * * * and the same would be true of the water lines * * * (could have put in a different system)—the size of the line would be the same.”

(Landz Tr. 94, l. 21.)

“In the development of the drilling, carrying in supplies * * * taking oil

from them it was again the development of the Fifer lease.”

(Tr. 97, l. 6.)

The pumping of the water and oil are the same.

“Exactly same equipment.”

(Tr. 102, l. 15.)

Says the witness Sontag—Landz successor in the field:

“These oil lines that were put in to handle the Fifer production were not increased. (Tr. 113, l. 1.) They would be identical for handling the Fifer production as though they handled several places in that vicinity. There is no increase in the character of the trespass. (Tr. 113, l. 5.) The pump installed was the size necessary for the handling of the Fifer production as it come to us. (Tr. 113, l. 12.) The telephone was necessary for handling the Fifer production if we had had no other (Tr. 113, l. 29.)

“With reference to the use of this pumping station, I would have put in a pumping station of the size and capacity there to take care of the production of the Fifer tract, and I would have put in that pumping station to take care of the 45 or 50 barrel production of the Fifer No. 1.” (Tr. 118, l. 5 to 10.)

This is absolutely all the testimony there is on this branch of the case. No testimony whatever that these pipe-lines were increased to handle other production; that this pumping station was of excess size. Nothing whatever to show that the damage was increased by virtue of this additional use. If counsel in response to the repeated objections had promised to connect it up with proof that it made an additional burden or trespass it might have been proper to admit it subject to a motion to strike. But such is not the case. The court even went further—included it in his instructions. All this must have had its effect upon the jury and we believe it did. In light of the fact that the testimony of these two witnesses is the only evidence in the case upon this branch of it that issue should have been withdrawn from consideration by the jury.

At the outset of the trial we believe the Court announced the correct rule. We were never quite clear on what caused the court to modify its position or rather erroneously extend it. The Court's original position can best be given by quoting from the transcript.

“THE WITNESS. The Frantz Corporation also placed upon the property five or six tanks, storage tanks. There have also been built three pipe-lines in and upon the property.

“THE COURT. The lease provides for this.

“MR. FORD. Yes, but it also provides for any damage done, that they will pay any damage done to growing crops, fences or any other damages.

“THE COURT. How can you call it a damage when the contract calls for them to do that, both parties; that is, if they were built for this land?

“MR. FORD. We will show they were used in connection with their general operations on other lands.

“THE COURT. Can you make any showing that they were built for use in connection with this land?

“MR. FORD. In connection with this land?

“THE COURT. Can you show a segregation of damages because they were used in connection with other land?

“MR. FORD. Possibly not, but the position we take is that they had a right to go in and build these power-lines or tanks or any other work necessary in connection with their operations, they had that right, but they have stipulated that whatever the damage is that they will pay for.

“THE COURT. Yes, growing crops, fences and other damages. I doubt if you can find any authority, in view of the contract, in the operation of mining or

leasing of your premises, so far as the soil is concerned, that any of these necessary operations would be considered a damage. You might as well sink a score of wells and say he is damaged in the piles of slush thrown out, and in mining the tunnels run. Have you any authority to sustain you?

“MR. FORD. So far we have not. This is a peculiar lease because of the written portion contained in here, if the Court will examine the lease; it is a printed lease, but this clause is written in, the parties having contracted to pay the damage. I am frank to say we can find no authority.

“THE COURT. When we see some of these papers come into Court, we are frank to say we don't see how they can do business without a guardian.

“MR. FORD. But a lease of this character is strictly construed against the lessee and in favor of the lessor, and the lessee having contracted to pay any damage, it is not limited, it is unlimited, to pay plaintiff damages that resulted.

“THE COURT. Well, I will hold that any damage like to the crops or fences that these parties would do in carrying on their legitimate operations would of

course be within that term of the lease I think, but damage would accrue by reason of their sinking a well or placing a pipe-line to convey the oil or water for the benefit of both parties, the injury that would do wouldn't be called damages. I can't understand any principal of law that would call that a damage; if it is a damage it is without injury, because it is the very thing you contemplate shall be done; they might carry on their operations, such as they have bound themselves to do by this lease, without doing any damage to crops or to fences if they were careful enough, and hence not necessary, but these *things that they must necessarily do, like placing your pipe-line, sinking your well, pumping, I don't think that even this lease, as crudely drawn, would consider that a damage.* Certainly parties acting together wouldn't call that a damage to the land; no, that is the very thing they were going to do to pour wealth into the pockets of both of them. I think I would place that construction on it, in the absence of any authority from the standpoint of principle and reason; but if they have placed on there instrumentalities that are not for this particular land, to carry out this particular lease, seeking to make it the base

of operations for their other surrounding lands, that were not contemplated by the parties, I think you might show it; it will be a matter to be shown to the jury; make the best proof of any damage on that that you can and it will be for the jury to determine to the best of their judgment whether it is in fact a damage in the sense of the word. I think you may show the entire situation as far as you think it necessary." (Tr. p. 46 line 13, pp. 47, 48 to line 3 p. 49.)

It seems almost impossible that after this statement the court would as it did permit testimony of the cement construction of the building and its cost. The court went beyond its first position and we think was clearly in error in permitting this objectionable testimony and in not peremptorily taking these issues from the jury.

We believe and urge upon this appeal that the true rule in this case (particularly since the ambiguity comes from the lessor) is that first indicated by the court—to-wit, that the burden of proof was and is upon the lessor to show (1) what damage comes within this last clause of the lease and (2) segregate it from other damage which was clearly contemplated and by the fact of the lease cosented to. This they did not do. The only testimony upon the subject is that offered by the leasee

which stands uncontradicted that the uses of the surface were only such as were necessary for the Fifer production. There is no testimony whatever that these *structures* destroyed crops or fences. As to the other element of damage the fences and the stock going upon the crops—the rule cast the burden of proof upon the lessor to show what of this was from causes not contemplated or not excused from and within the ambiguity which he himself had created.

The lease is to be construed most strongly against the lessor, and in favor of the lessee.

Chamberlain v. Brown (Ia.) 120 N.W.
334;

Cohen v. Newman 158 N. Y. S 1111;

Conneau Lake Ice Co. v. Quigley (Pa.)
74 Atl. 648.

As heretofore indicated there is nothing in this suit that entitles this lease to the benefit of the exception as to the rules of construction of contracts. *Accordingly we assert that the lease itself is a grant of an estate.* Since no right of farming, etc. was reserved, (or could be as against necessary development for oil) no damage can be claimed with the possible exception of damages, if any, occasioned at the time of entry or up until the estate became finally fixed by the discovery of oil (May or June, 1921, Tr. 100, L 16).

The question of the character of oil leases has been frequently before the courts. Whether they are grants of a stratum of earth—bills of sale of certain personalty when taken and removed from the earth, or a license or permit to go upon lands for the purposes contemplated is a question of construction of the particular lease in question. To construe a lease contract in Montana we again turn to the Montana Codes:

“All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided in this code.”

Sec. 7626 Mont. Revised Codes.

No exception exists in Montana as to oil leases. The general rules of construction we have heretofore given apply. We then come to consider this lease and the meaning of its use of the terms

“Grant, demise, lease and let”.

(Tr. 2 L. 18.)

and the past tense

“has granted, demised, leased and let.”

(Tr. 8 L. 19.)

and the provision that the same shall extend to

“their heirs, executors, administrators, successors, or assigns.”

(Tr. 11 L. 20.)

“Grants are to be interpreted in like manner with contracts in general, except

so far as is otherwise provided provided in this chapter.”

Sec. 6869, Mont. Revised Codes.

“A grant is to be interpreted in favor of the grantee * * *.”

Sec. 6852, Mont. Revised Codes.

“The transfer of a thing transfers also all its incidents, *unless expressly excepted* * * *.”

Sec. 6857, Mont. Revised Codes.

“One who grants a thing is presumed to grant also whatever is essential to its use.”

Sec. 8751, Mont. Revised Codes.

We do not insist that this property was let for any other purpose than that of drilling for oil. *But there were no reservations of any uses thereof by the lessor.* Hence no damage could accrue to something he did not reserve. A great many leases are found where the farming right was reserved, or certain acreage was to not have its surface disturbed by drilling, tanks, etc. But these were express exceptions to avoid the law that the transfer of the thing carries all the incidents. This grant was absolute in form for the purpose indicated. As against those purposes, no reservations for farming, for ground not used for roads,

of right to plant some particular crop, were made. Within the terms of the agreement it was an estate, yes in fee so long as oil and gas should be found.

Graciosa Oil Co. v. St. Barbara Co. (Cal.)

20 L. R. A. N. S. 211;

Guffery v. Smith 237 U. S. 101;

Walford Oil etc. Co. v. Shipman (Ill.) 84
N. E. 53;

People v. Bell (Ill.) 19 L. R. A. N. S. 746;

Lowther Oil Co. v. Miller-Sibley Oil Co.
(W. Va.) 44 S.E. 433;

So. Penn Oil Co. v. Snodgrass (W. Va.)
76 S. E. 961.

There is nothing in the lease to indicate an intention to reserve the surface. On the contra the lease evinces an intention otherwise.

Where reservations are contemplated by the parties it is the common practice to mention them—such as right to farm the surface, or a proviso for burying pipe-lines, or other similar direction which indicate that the surface shall not be interfered with.

Also we frequently find a reservation that there is a certain acreage upon which there is not to be any drilling or buildings, but even such as this latter is subservient to the dominant estate.

Lynch v. Burford (Pa.) 50 Atl. 266.

Reservations are also found providing for no drilling within a certain distance of buildings, or structures of the lessor, or providing the entry of roads, material, etc. shall be on a certain road. No such reservations are found here.

On the contra the lease discloses a different intent. The contingency which vested the estate of the lease happened—oil was discovered and his interest in real estate became fixed.

Rauling v. Armel (Kan.) 79 Pac. 683;
His rights became vested rights.

Dieley v. Coffeyville Etc. Co. (Kan.) 76
Pac. 398.

The lease recognizes the change of title (without reservation of surface) when this contingency of oil discovery happened and provides:

“It is understood and agreed that *all* taxes and assessments levied against *said land or the production* (note both land and production) therefrom shall be paid by the respective parties *in proportion of the interest* of each, in the production from said land, that is one-eighth ($1/8$) by the lessor and *seven-eighths* ($7/8$) by the lessee. (Tr. 10-11.)

Again frequently oil leases provide for the lessor to have free gas about his buildings or oil as he may require for his uses. No such provisions are

here found. There is not one paragraph in this lease which can be said to indicate an intention to reserve any estate, or privilege, in the surface of this land after the discovery of oil by the lessee. Not even a clause to the effect that he has the right to reside thereon. In fact as lessor says about his leaving:

“I sold my stuff until further operations, until they either got out of there so that I could start again and *start in new if they didn't make a success.*”

Pregnant with the suggestion that if they did get oil he knew he would never come back.

This being the dominant estate the inferior estate cannot be asserted against it. Particularly is this true because of no reservations, clear intent of the parties, and the statutory rules of construction. Also the granting words created an estate in effect in fee.

The pipe-lines, telephone lines, power station, etc. were clearly cases of *damnum absque injuria*.

The roads were incidents of ingress and egress with the lease. Implied covenants they have been called.

Knoths v. McGregor (W. Va.) 35 S. E.
899;

Essentials to its use and enjoyment.

Sec. 8751 Mont. Revised Codes.

Upon the question of the roads the testimony is clear (except possibly the road to the southwest) that these roads were originally used for this development. True they later passed over them to get to the camp and possibly (upon conflicting testimony) other operations, but the road was there from and for the Fifer operations. Prior to this time the road was used by the house. (Tr. 90, l. 16.) The trespass(?) was not added to by other uses. It must be admitted that with the renting of land the right of passage way over for the business contemplated goes with the lease.

Sec. 8751, *supra*.

There are not a great many cases upon the subject of roadways as applied to oil leases. In one case the right is clearly recognized although the decision is based upon another point in the case.

Coffindaffer v. Hope Etc. Co. (W. Va.)
81 S. E. 966, 52 L. R. A. N. S. 473.

However, the question has come up in a great many cases of mining operations and the right to passage way—also the right to transport coal *from other properties* over the way in question has been repeatedly recognized.

New York Etc. Co. v. Hillside Etc. Co.
(Pa.) 74 Atl. 26;
Con. Coal Co. v. Schnisseur (Ill.) 25 N.
E. 795;

Schobert v. Pittsburgh Etc. Co. (Ohio) 80
N. E. 6;

Lillibridge v. Lakenanna Coal Co. (Pa.)
22 Atl. 1035, 24 Am. St. Rep. 544, 13
L. R. A. 627;

Schobert v. Pittsburgh Etc. Co. (Ill.) 98
N. E. 945, 40 L. R. A., N. S. 826.

The structures contemplated by the lease and the rights of way incident to the operations contemplated were all matters for which the plaintiff should not be entitled to recover any damages, and upon which no proof should have been permitted. We believe the court was clearly in error in not sustaining our objections to this proof and in submitting these issues to the jury at all. The evidence must be presumed to have created prejudice in the minds of the jury. It was error to receive it. It was error to have it submitted in instructions.

The only issue upon which there could be any serious difference of opinion is the question of damages to the fences and possible damage to the crop up to the time the estate was created, or in excess of territory actually needed and used for the development. Upon this phase of the case, even though for the sake of argument only, we yield the point that damages might be claimed, under this lease, we do not believe the testimony offered was sufficient to meet the rules as to burden of proof and to entitle the case to go to the jury. The lessee be-

ing upon and in possession of the premises under rightful authority in the first instance cannot be held as a willful trespasser. His responsibility is for his negligent acts. Before he can be held for these the lessor must prove, as the court indicated in his comments, (Tr. 46, l. 29) what portion of his damages are damages for which the lessee would be responsible, and secondly, since the record is undisputed that others went across and over his land, what portion of the damage was due to the acts of the lessee alone. In other words, if there was a confusion of causes of damage, plaintiff has not sustained the rule of burden of proof sufficient to entitle his case to be submitted to the jury in this case by the bare proof of the lessee having committed certain acts. The testimony is undisputed that there was a stampede. That these roads were used by a number of people; that there were several outfits drilling in that vicinity and used these roads; also undisputed that when they first began their operations they kept the gates closed. (Tr. 95, l. 17). With this confusion of causes producing damage the burden was upon the lessor to show; First, that within these causes there were some that were not *damnum absque injuria*, that he could recover for; that the causes of his damage were causes for which he had the right to hold the lessee in damages. Certainly the testimony here shows a general stampede; a number of people going across these lands and their fences. No where in the evi-

dence does Fifer show the trespass as being independently and alone from the lessee. The cause of the damage as to whether it was the corporation's acts or acts of strangers is a matter of speculation. This we urge does not satisfy the rule as to burden of proof, particularly since the lessee's original entry was lawful and the acts must be proven to have been negligently done.

“No cause should be withdrawn from a jury unless the conclusion from the facts necessarily follows, as a matter of law, that no recovery could be had upon any view which could reasonably be drawn from the facts which the evidence tends to establish. However, under this rule, the record must contain competent testimony fairly tending to affirmatively prove the allegations of the complaint. The burden of proof is still upon the plaintiff, and is not satisfied if the conclusion to be reached from the testimony offered is merely a matter of conjecture. If such conclusion be equally consonant with the truth of the allegations, and with some other theory inconsistent therewith, it then becomes a mere conjecture, and the rule of the burden of proof is not satisfied. (Shaw v. New Year Gold Mines Co., 31 Mont. 138, 77 Pac. 515) Slater's testimony as to ownership is entirely circumstantial,

and while, of course, these allegations can be proved in that way, yet such proof must be measured by the rules applicable in such cases. It must not be susceptible to any other equally reasonable inference than that which may be drawn in favor of the plaintiff. *In fact, it must tend to exclude all other inferences.* On the other hand, if it is susceptible to any other equally reasonable inference, the proof then fails, and, measuring the proof here by this standard, it certainly falls short of 'fairly tending to affirmatively prove' the allegations of plaintiff's complaint."

Park v. Grady, 62 Mont. 246 at 252.

"Actionable negligence may be shown by circumstantial evidence, but the circumstances must tend directly to establish the cause of action. The burden of proof is upon the plaintiff, and is not satisfied if the conclusion rests merely upon conjecture or speculation, or if the facts and circumstances have an equal or stronger tendency to support some other theory inconsistent with the one upon which plaintiff relies."

Fusselman v. Yellowstone Valley Etc. Co.
53 Mont. 254 at 266.

“Under this rule, however, the record must contain competent testimony fairly tending to affirmatively prove the allegations of the complaint. The burden of proof is upon plaintiff, and is not satisfied if the conclusion to be reached from the testimony offered is merely a matter of conjecture. If such conclusion be equally consonant with the truth of the allegations, and with some other theory or theories inconsistent therewith, it becomes a mere conjecture, and the rule of the burden of proof is not satisfied. Thus, in an ordinary case of negligence, like the one under consideration, plaintiff has the burden of proving the negligence of defendant as alleged, and also that such negligence of defendant, or that such negligence was the proximate cause of the injury, to conjecture, it is insufficient to establish plaintiff’s case. If the conclusion to be reached from the testimony is equally consonant with some theory inconsistent with either of the issues to be proven, it does not tend to prove them, within the meaning of the rule above announced. The use of the word ‘tend’ does not contemplate conjecture. It contemplates that the testimony has a tendency to prove the allegations of the com-

plaint, and not some other theory inconsistent therewith.”

Shaw v. New Year Gold Mines Co. 31
Mont. 138 at 146.

“When the evidence is in this condition, it will not support a recovery. The burden is upon him who alleges negligence to prove it by substantial evidence; and this burden is not sustained if the evidence furnishes the basis for two equally permissible conclusions as to what caused the injury, one of which speaks negligence on the part of the defendant, while the other is wholly inconsistent with it, and points to some other efficient proximate cause. This court has repeatedly so held.”

Scheytt v. Gallatin Valley Milling Co.
54 Mont. 565 at 572.

“And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee

is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

Patton v. Texas & P. R. Co. 179 U. S. 364.

The plaintiff offered proof to show that defendant and its agents entered upon the land described in the oil and gas lease, built roads thereon, built a power plant thereon for the purpose of pumping oil and water, erected tanks thereon for storing oil, laid pipe lines for carrying oil and water, and erected a telephone line thereon to be used in connection with the operations of the defendant, but plaintiff failed to prove by competent evidence, or otherwise, that these acts caused any damage other than the opening of the fences, which opening of fences allowed range stock to enter upon the premises and destroy the growing crops. The evidence introduced by plaintiff herein, if sufficient to prove damages at all, and plaintiff in error denies that it is, limits the recovery of plaintiff to damages done to his fences and damages done to his growing crops. There is no evidence in the record to show that the *lands of plaintiff have been permanently injured, or otherwise injured*, so that said lands of

plaintiff are of less value to the plaintiff, for which said lands were being used by plaintiff, but on the contrary the plaintiff testified as follows: (Tr. 62)

“The reason I left my place in the fall of 1920 was that I sold off my cattle and chickens, because I couldn’t keep my place and operate it, because the fences were torn down and kept torn down, and I tried all summer to keep them up, and I sold my stuff until further operations, until they either got out of there so that I could start in again and start in new if they didn’t make a success.”

Under the evidence introduced on behalf of plaintiff in the case, and under the pleadings in the case, the trial court erred in permitting evidence to be introduced showing the value of the land before the entry by defendant and the value of the land after the entry by defendant.

“The difference in the value of land before and after the trespass is the general rule as to the measure of damages for an injury to the land itself, and this means the difference in value of the entire tract, not merely the ground at the exact place of injury. But where the land can be restored to its former condition, at a cost less than the diminution in value, if it is not restored, the cost of restoration, plus

compensation for loss of use, is frequently laid down as the measurement of damage, however, the application of this principle is confined to cases where the cost of restoration is less than the difference in the value of the land before and after the trespass, and of course it is limited to cases where cost of restoring the specific land is less than the value of the land. Evidence of cost of restoration is admissible only to reduce, not to increase, the damages above the diminution in value of the land resulting from the trespass."

38 Cyc. pages 1126-1127;

Eby v. City of Lewistown, 55 Mont. 113,
173 Pac. 1163.

"Where a thing growing on and a part of the realty has a distinct value, such as growing grass, recovery must be for the value of the thing destroyed, and not the difference between the value of the real estate before and after the destruction."

Marron v. Great Northern Railway Company, 46 Mont. 593, 129 Pac. 1055.

"No recovery can be had for merely remote or speculative damages. Damages are given as compensation, recompense or satisfaction to plaintiff for the injury actually received by him from defendant,

and they must be the natural and proximate consequence of the act complained of.”

38 Cyc. 1138.

As hereinbefore recited, there is no evidence in the record to prove that the *land of the plaintiff was injured, or that the turf of the pasture lands or meadow lands was injured*. For this reason the trial Court erred in permitting evidence to be introduced showing the value of the land before the entry by defendant, and the value of the land after the entry by defendant.

It is a rule of law that “if the thing destroyed, although it is a part of the realty, has a value which can be accurately ascertained without reference to the soil on which it stands or out of which it grows, the recovery must be for the value of the thing thus destroyed, not the difference in the value of the land before and after such destruction.”

Atlantic & B. Air Line Ry. Co. v. Brown,
158 Ala. 607, 48 South, 73; 4 Sutherland on Damages, 3d ed., 1023, 1049;
St. Louis Etc. R. Co. v. Noland, 75 Kan.
691, 90 Pac. 273.

The plaintiff testified as follows: (Tr. 61)

“In 1920 practically no injury was done to the meadow lands because the fence was kept up until after the first crop.”

If this be true, and the plaintiff should know the facts if anyone does, then the damages suffered by plaintiff, according to his own testimony, is the damages to his fences and damages for loss of pasture and crops. The plaintiff testified (Tr. 44 and 59-60) that his damage for loss of pasture is \$150.00 a year for the years 1921 and 1922. As to proof of the damages to fences, plaintiff testified: (Tr. 39-40)

“In 1920 I rebuilt the fence and worked practically all summer running stock and building fences. * * * In the spring of 1920 I put in a full and complete new fence, about 60 rods by the coulee, where all the wire and posts were gone. I put that in the second time. The reasonable value for the materials and work that I performed there in making those repairs varies; the wire, I think I paid \$5.50 for the spools, and posts, and then my time. My time all that summer was in that line of work. It ought to be worth \$100.00 a month, the way the wages were then, for my time, besides the materials. I started in about the first of March, 1920, and put in my time at that work up to September.”

As to the fences plaintiff further testified: (Tr. 42)

“Along about March, 1921, I went down on that piece of forty and fixed up the fence and drove the stock out. That spring I repaired the fence all around the place, all around this forty acres. I was about three days, there on the first time, and drove the stock all out, and fixed up the fence. I had to furnish posts and wire to repair it. I should judge the reasonable value of my time and the materials furnished for that purpose was twenty or twenty-five dollars.”

As to the fences the plaintiff further testified:
(Tr. 53)

“In my judgment it would cost about \$60.00 a quarter for the red cedar posts and four galvanized wire, to replace the fences that have been torn down in connection with the operations of the Frantz Corporation. I had three quarters on the north, two on the west, one on the south and then on the east and south; this cross-fence here, a quarter, and then one in and around, and a line fence I described a few minutes ago, and one crossing the river.”

If this testimony be true, then the cost of rebuilding all of the fence would not exceed the sum of \$600.00, as there were ten quarters, according to the testimony of the plaintiff.

Under any possible theory of the case the maximum amount of damages proven by plaintiff is the sum of \$600.00 for destruction of fences, which amount is the sum that it would cost the plaintiff under his own testimony to rebuild his fences in the event that the oil estate should cease, and he desired to renew his former operations thereon as indicated by his testimony.

As to the damages for the 1921 and 1922 crops, the following evidence was introduced by plaintiff: (Tr. 60)

“I left the place and moved to Lewistown late in the fall of 1920. In 1921 I did not cut any at all, and in 1922 I wasn't there.”

(Tr. 44) “In 1921 I don't know what the market value of the hay was in that vicinity. I don't know what the market value of blue joint was in the fall of 1922. I wasn't right in that locality.”

The evidence of the plaintiff with reference to the amount of the crops and the value of the crops for the years 1921 and 1922 is uncertain and remote, as the record discloses. Al Dixon, a witness for the plaintiff, testified: (Tr. 64-65)

“I paid no particular attention to them in the year 1920. I don't know what the general conditions in that vicinity were in the summer of 1921. I wasn't there. I

returned to that country about the middle of February, 1922.”

This witness, Al Dixon, testified (Tr. 65) “that the sweet clover would go a ton and a half to the acre in 1922.”

Objection was made by attorney Marshall on the grounds that there is no evidence to show it was in sweet clover in 1922, and in answer to the objection attorney Ford, representing the plaintiff, stated: “No, there was no crop.”

Surely evidence of this character is of very little value to prove the amount of the crops or the value thereof. There is no proof in the record to show the costs of raising, harvesting and caring for the crops of plaintiff, and this is an essential factor in arriving at the damage. It is true that there is testimony in the record to show an estimated cost of \$2.00 per ton to cut and harvest the hay, and an estimate of \$50.00 a year to irrigate the lands, but this evidence is uncertain and remote, and not sufficient to come within the law.

“Damages based upon the value of un-matured crops are analagous to profits lost, and are governed by the same rule precluding recovery in cases or either uncertainty or remoteness. The question of whether damages based on the result of an un-matured crop are speculative must be determined by whether there is sufficient data to determin with reasonable

certainly the probable value it would have had if matured. The cultivation of similar crops or portions of the same on adjoining lands, under similar conditions, may furnish data sufficient to remove the uncertainty as to damage to an unmatured crop.”

17 Corpus Juris, page 785;

Rass v. Sharp, 46 Mont. 474, 128 Pac. 594;

Shotwell v. Dosey, 8 Wash. 337, 36 Pac. 254.

From the pleadings and evidence in this case it is evidently the theory of the plaintiff that “defendant took possession of the property and ousted plaintiff therefrom.” Plaintiff in error does not subscribe to this theory. If this is the theory of the plaintiff in the case, then plaintiff is not entitled to recover damages herein, as there is an entire failure of proof to warrant recovery, and the trial court erred in permitting evidence of and informing the jury to the effect that the difference in the value of the land before the entry and the value of the land after the entry was the rule of damage, for the reason that under this theory the rule of damage is the value of the use of the property.

38 Cyc. 1127-1129;

Sec. 8687 Mont. Revised Codes.

The foregoing covers practically all of the Assignments of Error and to some extent those that are not directly mentioned. However, we do not want to waive the Assignment of Error III, g, for the reason that we believe the lessee was entitled to show that whatever hauling was done for the purpose of its camp was done by independent contractors. As a matter of fact its supplies and materials for the permanent camp of the company, to wit, the camp on the Charles tract was done by independent hauling on a per pound basis, practically the same as that of a railroad, so that the use of the roadway was by some one other than the lessee corporation yet we were not permitted to show this. While it was true that it was used for its benefit at the same time it was no part of its operations but was a continuation of its freight hauling from the railroad to the camp. We believe we were entitled to show this, not only in mitigation of damages, but also to show that there was a confusion of causes which brought about any damage which may be claimed by reason of the roads or their use. Bringing the case within the rule in *Shaw v. New Year Gold Mines* case and also proper under a general denial.

Upon Assignment III, j, which has to do with the question asked of expert Sonntag as to the reasonable value of similar lands for like purposes and use we believe the court was distinctly in error in refusing to permit testimony in light of plaintiff's theory of the case, which we do not consent is the

correct one. This evidence was clearly admissable in mitigation of damages.

As to the error assigned upon the court's instructions, we have practically covered this in the foregoing argument, wherein we have attempted to show this court that the lower court had an entirely wrong theory and erroneous impression of this contract, its intent, its force, and its effect. Following out its theory the court instructed the jury peremptorily that they should allow damages in such amount as they would fix for these elements, which we believe were entirely incident to the lease, or *damnum absque injuria*. We also believe that the court's instruction was erroneous upon the question of the measure of damage to these lands under the rule in Montana.

This appeal is a most important and serious one of the oil industry. If an oil lease can be given which clearly contemplates structures upon the land, that contains no reservations whatever to the lessor, that must carry the incidents of right of ingress and egress, and then after it has been acted upon and used, oil discovered and an estate vested and recognized as an estate in the land, the lessee can be held up in damages for damages to the surface that was not reserved and given no indications of reservation, oil leases may become valueless and oil land development may be greatly retarded and diminished in Montana.

With the possible exception of the fences there is not one iota of damages proven in this case that was not entirely within the lease, or incident to its use, and within the contemplation of the parties and the laws of construction of the contract. As to the fence, granted that recovery might be had for it which we do not concede because we did not destroy them, the maximum of proof is \$600.00 damages. With the jury finding a verdict for \$3,500.00, it is quite apparent that the admission by the court of the evidence on the other claimed damages prejudiced the jury and brought about a verdict far in excess of that which the evidence would sustain.

We respectfully submit this cause should be reversed and new trial ordered.

Respectfully submitted,

C. J. MARSHALL,
STEWART & BROWN,
Attorneys for Plaintiff in Error.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT. 13

THE FRANTZ CORPORATION,
a Corporation,

Plaintiff in Error,

vs.

E. J. FIFER,

Defendant in Error.

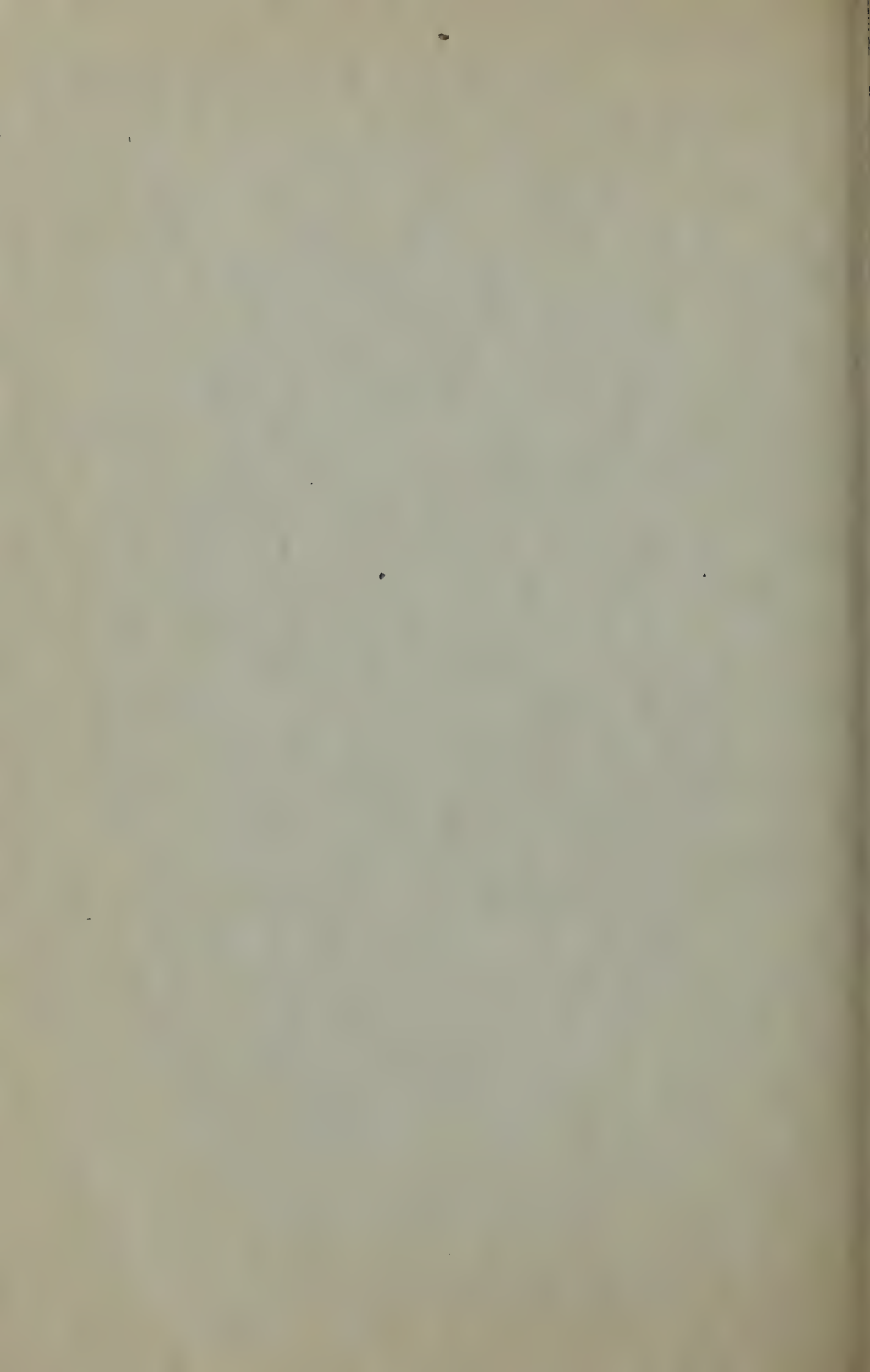
BRIEF OF DEFENDANT IN ERROR

FORD & CHOATE

Attorneys for Defendant in Error.

FILED.....1923.

.....CLERK



IN THE
United States Circuit Court of Appeals
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THE FRANTZ CORPORATION,
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BRIEF OF DEFENDANT IN ERROR

STATEMENT OF THE CASE.

The statement of facts and pleadings as contained in the brief of plaintiff in error may be taken as substantially correct, in as much as the transcript sets forth all of the facts set up in the complaint, except that defendant in error sought to recover \$2,500.00 per annum for loss of hay, grain, corn, grasses, vegetables and pasturage; \$1,200.00 for damage to fences;

\$4,000.00 for damage to his lands by reason of the construction of pipe lines, telephone lines, tanks and power stations and other structures thereon and the building and establishing roads over and upon said lands and \$2,500.00 damages resulting from loss to his successful farming and stock raising business (Tr. 6).

We cannot subscribe to the statement of evidence as set forth in the brief of plaintiff in error, but prefer to discuss the evidence in connection with the various assignments of error.

We will follow, as near as possible, the order in which the various assignments of error are treated by plaintiff in error.

ARGUMENT.

The main question here presented is the interpretation of an oil and gas lease (Tr. 8-12), upon which the complaint for damages is based. The other points relied upon by plaintiff in error are merely incidental to the main question.

Many pages of the brief of plaintiff in error are used in an effort to show that the lease in question is ambiguous and uncertain and therefore in arriving at the intent of the contracting parties resort must be had to the technical rules of construction. We insist that a careful reading of the lease will disclose no ambiguity or uncertainty, save perhaps the clause "or other damages," contained in the written portion thereof. The effect of the interpretation of the trial court

was to read this clause out of the lease, which was to the decided advantage of plaintiff in error, and consequently it is in no position to complain.

We are not considering an ordinary oil and gas lease. From an examination of the printed portion of this lease it will be seen that it is strongly favorable to the lessee. There is no provision giving lessor the right to free use of oil and gas; no provision restricting operations within certain districts from buildings upon the premises; no provisions for forfeiture in case of failure of the lessee to comply with the terms and provisions thereof and other provisions usually found in oil and gas leases. An examination of oil and gas leases to be found in the reported cases will disclose no lease more favorable to lessee and less favorable to lessor and for this reason we believe the rule that an oil and gas lease is constructed most strictly against the lessee and favorable to the lessor, should apply in this case.

The lease in question is prepared upon a printed form; at the bottom of the printed portion there is contained a written provision as follows:

“Lessee further agrees to pay to the lessor any damages caused to growing crops, fences, or other damages upon said premises, by lessee or the lessee’s agent.”

Many courts have been called upon to construe oil and gas leases and we believe the rule of interpretation as adopted by the courts is that such leases

are construed most strictly against the lessee and favorably to lessor.

Morrison on Oil and Gas, page 62.

Bettman vs. Harness, 42 W. Va. 433. 36
L. R. A. 566.

Steelsmith vs. Gartlan, 45 W. Va 27, 29 N. E.
978.

Huggins vs. Daley, 99 Fed. 606.

Corklin vs. Korandusky, 127 N. Y. appel.
761-112 N. Y. (Sup.) 13.

Aycock vs. Reliance Oil Co., 210 S. W.
(Tex.) 848.

Curtis vs. Harris, 184 Pacific (Okl.), 574.

The reason for the rule as announced by the Supreme Court of Ohio is as follows:

“And in view of the fact that such companies usually prepare their own forms of leases, with the assistance of skilled attorneys, which the lessor, without experience in such matters, acts without such legal advice, such leases are to be construed favorably to the lessor, with all doubts resolved in his favor.”

Ohio Oil Co. vs. Burch, et al, 124 N. E. 781.

“In discussing the right of lessor to rents or royalties, it must be borne in mind that oil and gas leases are usually construed favorably, in this respect, to the lessor, if there be doubt concerning the right to rent or royalty, and its amount. The general rule is undoubtedly that a deed is construed most strongly against the grantor and in favor of the grantee. But such

is not the case in an instance of an oil or gas lease; the reason for this arises out of the well known transaction of oil and gas operators. These contracts are looked upon somewhat in the same light as contracts of insurance. By long experience insurance companies have been able to draw a policy which is often difficult to determine just what their liability may be. They have their attorneys who have spent years in studying contracts of insurance and the decisions of the courts, until they have become thoroughly versed in all phases of such contracts. On the other hand, the insured is usually without advice when entering into a contract of insurance and he is almost universally ignorant of the rules of law applicable to such obligations. To such an extent is this true that the courts have adopted a construction, in cases of doubt or obscurity, favorable to the insured. What is true of insurance contracts, may be said to be true of oil or gas leases (if not mining leases). The lessor usually knows nothing of the law applicable to such instruments; while the operator is usually well informed. Years of experience have shown the operator how to draw a lease giving him many advantages, of which the lessor has not even thought. For this reason the courts have adopted a rule to the effect to construe an oil or gas lease most favorably to the lessor, where its terms can be so construed without doing violence to the language used. If the lessor and lessee have put a construction upon the lease, as evidenced by their acts, the courts will adopt that construction.

“Contemporaneous acts of the parties may

be examined to discover the construction they have placed on the lease. And the construction put on the lease by the lessor and his successor in title cannot be changed by a subsequent purchaser, if the statute of limitations has fully run. The language of the lease or oil contract will also be given its ordinary and common understood meaning when no reason appears for doing otherwise; and it will not be held void for ambiguity when the contract of the parties can be ascertained from the language used in it."

Thornton on Oil and Gas (3rd Ed.), p. 386,
§ 3251.

This rule applies to the construction of leases of this character in every particular and not merely as to production, as contended by plaintiff in error.

If the contention of plaintiff in error is correct then the written portion of this lease must be entirely disregarded. This cannot be done. To construe it properly, it must be taken in its entirety and effect given to every portion of it, if by so doing a reasonable result can be reached; and only by construing the general printed provisions as they were intended to be construed—that is in connection with the special written provision therein contained, can the whole lease be construed, meaning given to every part of it, and use made of all its language in determining the intent of the parties.

"The whole of a contract is to be taken together, so as to give effect to every part, if rea-

sonably practicable, each clause helping to interpret the other.”

Section 7532, Revised Codes of Montana, 1921.

Wing et al vs. Brasher, 59 Mont., 10-20;

State Bank of Darby vs. Pew, 59 Mont., 144-155;

Esselstyn vs. Meyer & Chapman State Bank, 63 Mont., 461-473;

Emerson Braulingham Implement Co. Rangstad, 65 Mont., 297-304.

“The intention of the parties, which courts seek to discover in giving construction to a contract, is to be gathered, not from particular words and phrases, but from the whole context of the argument. In fact, it may be said to be a settled rule in the construction of courts that the interpretation must be upon the entire instrument, and not merely on disjointed or particular parts of it. The whole context is to be considered in ascertaining the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated clause. Every word in the argument must be taken to have been used for a purpose, and no word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof which can be gathered from the whole instrument. The contract must be viewed from beginning to end and all its terms must pass in review; for one clause may modify, limit, or illuminate, no substantive clause must be allowed to perish by construction, unless insurmountable obstacles stand in the way of any other

course. Seeming contradictions must be harmonized if that course is reasonably possible. Each of its provisions must be considered in connection with the others, and, if possible, effect must be given to all. A construction which entirely neutralizes one provision should not be adopted if the contract is susceptible of another which gives effect to all of its provisions. The courts will look to the entire instrument, and, if possible, give such construction that each clause shall have some effect, and perform some office. * * *"

6 R. C. L., p. 837, Section 227.

"Since the object of construction is to ascertain the intention of the parties, the contract must be considered as an entirety. The problem is not what the separate parts of the contract mean, but what the contract means when considered as a whole. * * * "

Page on Contracts, Section 1112.

"The contract must be considered as a whole, and regard must be had to the situation of the parties, the surrounding circumstances, and the object to be accomplished, in order to arrive at the intention of the parties."

Far West Oil Co. vs. Wittmer Bros., 143 Cal. 306-310, 77 Pac. 61-62.

To the same effect are:

Stockton Saving & Loan Society vs. Purvis,
112 Cal. 236, 44 Pac. 561;

Wilson vs. Asphalt Co., 142 Cal. 182, 77 Pac. 787;

Barnett vs. Barnett, 104 Cal. 298. 37 Pac. 1049.

“A contract must be construed as a whole, and the intention of the parties is to be collected from the entire instrument and not from detached portions, it being necessary to consider all of its parts in order to determine the meaning of any particular part as well as of the whole. Individual clauses and particular words must be considered in connection with the rest of the agreement, and all parts of the writing, and every word in it, will, if possible, be given effect.”

13 C. J., p. 525, Sec. 486.

No rule of law is better settled than that where a part of the contract is written and part is printed, that the written and printed portions must be construed together, but where there is an inconsistency between the written and printed portions or where there is doubt as to the meaning of the whole, the written portion will control the construction to be placed upon such contract.

“It is a well settled rule of law that where part of a contract is written and part is printed, and the written and printed parts are apparently inconsistent, if there is reasonable doubt as to the sense and meaning of the whole, the words in writing will control the construction of the contract. The reason why greater effect is given to the written than to the printed part of a contract if they are inconsistent is that the written words are the immediate language and terms selected by the parties themselves for the expression of their

meaning, while the printed form is intended for general use without reference to particular objects and aims. * * * The general rule is resorted to, only from necessity when printed and written clauses cannot be reconciled, and in that respect is like the rule applied in the construction of wills where two clauses are repugnant and irreconcilable, in which case the first will be rejected, and the subsequent clause will be regarded as indicating the final intention, in the absence of any other clue to the interpretation. But it is the imperative duty of courts to give effect, if possible, to all the terms of an argument. The construction is to be made on a consideration of the whole instrument, and not on one or more clauses detached from the other; * * * when the written and printed parts may be reconciled by any reasonable construction, as by regarding one as a qualification of the other, that construction must be given, because it cannot assume that the parties intended to insert inconsistent provisions * * * ”

6 R. C. L., p. 847, Sec. 237.

“If the contract is written in part and printed in part, as when it has been filled in upon a printed form, the parties usually pay much more attention to the written parts than to the printed parts. Accordingly if the written provisions cannot be reconciled with the printed, the written provisions control. The written parts are the immediate language and terms selected by the parties themselves for the expression of their meaning and accordingly must control in case of conflict. * * * ”

Page on Contracts, p. 536, Sec. 498.

In Montana the rule is by statutory enactment even broader than that announced by the authorities just quoted. Section 7542 of the Revised Codes of Montana 1921, provides:

“Where a contract is partly written and partly printed or where part of it is written or printed under the special direction of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from the form. And if the two are absolutely repugnant, the latter must be so far disregarded.”

Counsel cites Section 7545 of the Revised Codes of Montana 1921, as supporting the contention that the written portions of this lease should be most strongly construed against lessor, basing their contention upon the assumption that lessor caused the uncertainty to exist, and set forth a portion of said section; however, counsel neglected to quote the portions which are at variance with their contention and favorable to the interpretation sought to have placed upon said lease by defendant in error.

Said Section 7545 in so far as it is applicable here provides as follows:

“In cases of uncertainty, not removed by the preceding rules, the language of the contract should be interpreted most strongly against the

party who caused the uncertainty to exist. *The promisor is presumed to be such party; * * ** ” (Italics ours).

There is nothing in this record to show that lessor caused the uncertainty to exist and nothing from which such inference can be drawn so that if as counsel contends the words used in the written portion are ambiguous or uncertain then the court must presume that the lessee caused such ambiguity and uncertainty to exist. No evidence can be pointed out and no circumstances sufficient to rebut this statutory presumption.

Construing the lease then in the light of the authorities above cited there can be no difficulty in determining what was intended—no difficulty in ascertaining the true intent of the parties thereto and thus give force to each part and paragraph thereof without doing violence to the language used or the object sought to be accomplished.

Considering this contract as a whole, giving effect to each word, part and paragraph, considering the facts and circumstances under which it was executed, the matter to which it relates, its purposes and objects, there can be but one reasonable interpretation placed upon it, viz.: That lessor granted, devised, leased and let unto lessee, for the sole and only purpose of mining and operating for oil and gas, the laying of pipe line, etc., the lands in question, and lessee agreed to pay lessor any damages caused to growing crops, fences and any other dam-

ages upon said lands by lessee or his agents resulting from his operations thereon.

We believe the interpretation placed upon this lease by the trial court, so far as damages to fence and crops were concerned, was correct, and while we believe the court erred in not permitting recovery of damages to the land caused by the construction of roads, the building of pipe lines, etc., as coming within "or other damages," yet this question is not before this court.

Nothing could be plainer or simpler. We have the clear intent of the parties expressed in language not susceptible of a different meaning and not likely to be misunderstood or misconstrued. And in doing so we do not have to disregard or read out language placed there by the parties for a purpose.

But plaintiff in error will no doubt insist that such an interpretation makes the contract unreasonable and burdensome. We insist that there is nothing unreasonable in such an interpretation. But assuming for the sake of the argument that it is, that fact is no concern of the court. Whether lessee struck a good or bad bargain with lessor will not be considered. It is the duty of the court to enforce contracts, not to make new ones for the parties.

In the case of *Hinerman vs. Baldwin et al*, 215 Pac. 1103-1109 (Mont.), the Supreme Court of Montana in disposing of a similar contention said:

"Whether the plaintiff made a good or a bad

bargain is of no concern to the court. He was of legal age, and had all of the facts squarely and clearly before him long prior to the execution of the lease. Merely because the terms of the contract now appear unreasonable or burdensome affords no reason to permit him to avoid his contract. *Frank v. Butte & Boulder Co.*, 48 Mont. 83, 135 Pac. 904; *Pearce v. Metropolitan Ins. Co.*, 57 Mont. 79, 186 Pac. 687; *State Bank of Darby v. Pew*, 59 Mont. 144, 195 Pac. 852; *Friesan v. Hart-Marr Co.*, 64 Mont. 373, 209 Pac. 986; *Emerson-Brantingham Imp. Co. v. Raugstad (Mont.)*, 211 Pac. 305; *General Fire Extinguisher Co. v. Northwestern Auto Supply Co. (Mont.)*, 211 Pac. 308; *McConnell v. Blackley (Mont.)*, 214 Pac. 64.

“When parties have reduced their contracts to writing, the writing is presumed to contain the final agreement arrived at between them and to express their real purpose and intent. The duty of the court is to enforce contracts, not to make new ones for the parties, however unwise the terms may appear. To permit the avoidance of written contracts upon such pretext would be to open the way to defeat the very purpose of contracts in writing.”

Similar expressions may be found in numerous reported decisions, in fact this question is so well settled that we deem further authority wholly unnecessary.

Counsel for plaintiff in error discusses at some length the rights of a lessee under an oil and gas lease without reservation or restriction and attempts to show

that the construction of such a lease is applicable in the instant case.

We concede that under an oil and gas lease, which contains no reservations or restrictions, a lessee has the right to go upon the premises, construct roads, build pipe lines, power lines, power stations, in fact the right to do any and all things reasonably necessary to carry out the objects and purposes of the lease or incidental thereto and is not liable for damages or resulting injury to crops or premises. But we do not have such a lease for consideration. There is one saving clause, the reservation restriction and qualification that lessee shall pay any damages to fences, crops, etc., caused by lessee upon the premises. Unquestionably, save for the written provision contained in the instant lease, defendant in error could not recover for acts of lessee reasonably necessary in the development and operation of the leased premises.

Plaintiff in error presents here and for the first time the question of the right of lessor to use the surface of the leased premises to carry on his farming operations. It is argued that because no reservation of that right is expressly contained in the lease that lessor was in effect a trespasser without right to use his land for any purpose, and having done so he assumed the risk of having his fences torn down, his ditches destroyed and his crops eaten by stock owned by plaintiff in error and range stock. The contention is absurd.

There is nothing in the lease to indicate any such intention in the minds of the parties. The land was leased for the sole and only purpose of mining and operating for oil and gas, the laying of pipe lines, etc., and for no other purpose.

As a matter of fact the written portion of said lease contains the express reservation and qualification that plaintiff in error insists does not exist. The very fact that the lessee agreed to pay for any damages to crops and fences indicates beyond per-adventure of doubt that the parties understood that the lessor would continue to farm his property as he had been doing prior to the execution of said lease.

And again, during the year 1920 lessor did occupy and farm the land without objection on the part of lessee. In 1921 he occupied the premises during a portion of the season and attempted to cultivate a portion of it and again without objection on the part of the plaintiff in error. There is evidence in the record that since that time a party (although his status is not clearly defined) has been occupying the premises and cultivating a small portion of it without objection on the part of the lessee. In fact the evidence discloses that lessee furnished pipe which was used by said party for the purpose of conveying water for use upon said premises. It is shown conclusively that the parties to the lease understood that lessor had that right. This is the interpretation they have placed upon the lease and the court will give great weight to the practical interpretation thereof by the

parties. Surely there is no better method to determine what the parties to a contract meant than to ascertain what they have done under it.

Where parties to a contract of doubtful or ambiguous meaning have placed upon it a practical construction and have by their acts under it shown what they considered the contract to mean and especially where this particular construction is shown to have been followed for a long period of time, the courts invariably follow such practical construction and hold it to be controlling.

“The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done.

“Surely, there can be no doubt that in determining the meaning of an indefinite or ambiguous contract the construction placed upon the contract by the parties themselves is to be considered by the court. It has been said that in order to render applicable the rule that contemporary construction of a contract by acts of the parties is entitled to great weight, it should appear with reasonable certainty that they were acts of both parties, done with knowledge and in view of a purpose at least consistent with that to which they are sought to be applied. In such a case the practical interpretation by the parties themselves is entitled to great, if not controlling influence in ascertaining their understanding of its terms. In fact where from the terms of the

contract, or the language employed, a question or doubtful construction arises, and it appears that the parties themselves have practically interpreted their contract, the courts will generally follow that practical construction. It is to be assumed that parties to a contract know best what was meant by its terms, and are the least liable to be mistaken as to its intention; * * * .”

6 R. C. L. p. 852, Section 241 Page on Contracts, Section 1126;

District of Columbia vs. Gallagher, 124 U. S. 505;

Thomas vs. Cincinnati Railway Company, 81 Fed. 911;

City of Chicago vs. Sheldon, 9 Wall 50;

Hill vs. City of Duluth, 57 Minn. 231, 58 N. W. 992;

St. Louis Gas & Light Company vs. City of St. Louis, 46 Mo. 121;

School District of South Omaha vs. Davis, 76 Neb. 612, 107 N. W. 842;

Board of Commissioners vs. Gibson, 158 Ind. 471, 63 N. E. 982.

“The practical interpretation of any agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done.”

Insurance Co. vs. Dutcher, 95 U. S. 269-273.

Where there is any doubt from the language in

the contract as to what was intended in any regard it is customary for the court to place itself in the position of the parties who made it as nearly as may be done by considering all of the facts and circumstances, the nature of the subject matter, the relation of the parties and the object sought to be accomplished. The rule as announced by the Supreme Court of Montana in the case of

McDonald et al vs. McNinch et al, 63 Mont.
at page 315,

is as follows:

“It was the duty of the trial court to interpret the lease in the light of surrounding facts and circumstances bearing upon the transaction (Section 7538 R. C. 1921); in other words, to put itself as nearly as might be in the situation of the parties at the time they entered into the agreement, and to view the circumstances as they viewed them, and to judge of the meaning of the terms and the correct application of the language of the contract.”

The rule as laid down in Corpus Juris is as follows:

“Courts in the construction of contracts, look to the language employed, the subject matter and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and accordingly they are entitled to place themselves in the same situation as they viewed them, and so as to judge of the meaning of the

words and of the correct application of the language to the things described. It is therefore an established canon of construction that in order to arrive at the intention of the parties, the contract itself must be read in the light of the circumstances under which it was entered into. General or indefinite terms employed in the contract may be thus explained or restricted as to their application and meaning and the contract must be so construed as to give it such effect, and none other, as the parties intended at the time it was made. This rule appears to be applicable only when the terms employed are susceptible of more than one meaning. In such cases it is the duty of the court not only to regard the nature of the instrument, but also to inform itself of the circumstances which surrounded the parties at the time, so as to interpret the language employed from the standpoint which the parties occupied when they executed the contract. It has been declared, moreover, that the prevailing notions and opinions in the places where the contract was made are presumed to have entered into contemplation of the parties, and that in accordance with law are not to be discountenanced in construing the contract."

6 R. C. L. page 849, Section 239.

Page on Contracts, Sec. 1123.

State vs. Twin Falls Canal Co., 21 Ida. 410,
121 Pac. 1039.

The lease in question is dated September 26th, 1919, and the first work looking to development in the field was started November 21, 1919 (Tr. 97).

Defendant had filed on the land during the winter of 1913 and 1914, cleared the same, built ditches, enclosed it with a four galvanized wire fence, cedar posts set twenty feet apart around the entire tract, with cross fences, built hay corrals, stock corrals, barns, sheds, cow sheds, ice house, tool house, chicken house, two log houses 16x20 (Tr. 34 and 35). About twenty-five acres in the east forty and thirty acres in the south forty were under cultivation and growing hay. Defendant was engaged in farming and stock raising which had been carried on since he had resided upon the land (Tr. 36). In view of these facts and the practical construction placed upon the lease by the parties themselves it is ridiculous to say that lessor had no right to occupy and cultivate the land under the terms of the lease.

If the written provision does not mean exactly what it says, and as construed by the trial court, then the words are meaningless and must be brushed aside and the court must say that when this provision was inserted in said contract the parties intended an idle act and one that would accomplish no purpose in connection therewith.

Counsel will undoubtedly contend that this clause was intended to cover any damages caused by lessee not reasonably necessary in the development and operation of said property or incident thereto. Lessor had that right and no expressed stipulation or agreement was necessary.

It has been held that a lease not containing an ex-

press agreement providing that lessee should be liable for damages caused to crops or other surface rights, that lessee was liable for their destruction unless he showed that the damages to them were necessarily incidental to the operations authorized in the lease.

“A lease of a tract of land for oil or gas purposes does not necessarily exclude the lessor from using or cultivating its surface if it does not interfere with the operations of lessee.”

Thornton on Oil and Gas, Section 82.

In the case of *Pulaski Oil Company vs. Conner*, 162 Pac. 464 (Okla.), plaintiff in error contended that because the lease did not contain an expressed stipulation providing for the payment of damages for injury to crops, fruit, etc., lessor could not recover for such injury. The Supreme Court of Oklahoma in passing upon the question used the following language:

“While an oil and gas lease carries within its implications, if not within its expression, such rights as to the surface as may be necessarily incident to the performance of the objects of the contract, yet it is well settled that the implications go no further, and that the holder of a mining or oil and gas lease must protect the surface of the ground in so far as incident necessity does not exist.”

And the rule is announced in *Cyc*, in the following language:

“All incidental rights to that of getting minerals under a grant or reservation thereof must be ex-

exercised with due regard to the right of the surface owner without any permanent damage thereto not necessary for the beneficial enjoyment of the mine; * * * ”

27 Cyc., 784-b.

Plaintiff in error next complains that the trial court erred in permitting testimony relating to the damage caused in placing the various structures upon the premises and the instructions given to the jury in regard thereto. (Assignment No. II, III, a, b, h and No. V).

In considering these points it will be helpful to refer to the pleadings in the case.

In paragraph eight of plaintiff's complaint it is alleged that defendant acting under the provisions of the lease entered upon the land in carrying on its operations opened and tore down part of the fences of plaintiff enclosing said land, established roads across said lands, built pipe lines thereon, constructed telephone lines, tanks, power and pumping stations for the purpose of caring for and handling the production of oil produced upon lands other than those of plaintiff and built a water pumping station to supply water for its own operations in the Cat Creek field as well as to other persons operating for oil and gas in said field. (Tr. 4).

Paragraph three of defendant's answer admits the entry upon said land, opened some of the fences, established certain roads and the construction thereon of the structures set forth in plaintiff's complaint:

“for the purpose of caring for and handling the

production of oil produced upon the lands of plaintiff and other lands and built a water pumping station upon said lands to supply water for its operations in the Cat Creek field * * * ." (Tr. 16).

In paragraph ten of plaintiff's complaint it is alleged that in addition to the operations upon plaintiff's land that defendant at all the times mentioned was conducting extensive oil and gas operations on land adjoining and in the vicinity of the lands in question and that the operations upon plaintiff's lands were incidental to and a part of defendant's general operations and that defendant made use of plaintiff's lands in carrying on said general operations (Tr. page 5). In its answer defendant admits the allegations of said paragraph ten. (Tr. page 15).

During the course of the trial the court found it necessary to interpret the lease and it was held that plaintiff was entitled to recover damages to crops and fences, but that damage which would accrue by reason of the sinking of wells, placing of pipe lines, etc., in the development and operation of the leased premises was not an injury within the meaning of the lease. To use the language of the court:

"Well, I will hold that any damage like to the crops or fences that these parties would do in carrying on their legitimate operations would of course be within that term of the lease I think, but damage which would accrue by reason of their sinking a well or placing a pipeline to convey the oil or water for the benefit

of both parties, the injury that would do wouldn't be called damages. I can't understand any principle of law that would call that a damage; * * * I think I would place that construction on it, in the absence of any authority from the standpoint of principle and reason; but if they have placed on there instrumentalities that are not for this particular land, to carry out this particular lease, seeking to make it the base of operations for their other surrounding lands, that were not contemplated by the parties, I think you might show it; it will be a matter to be shown to the jury; make the best proof of any damage on that that you can and it will be for the jury to determine to the best of their judgment whether it is in fact a damage in the sense of the word. I think you may show the entire situation as far as you think it necessary."

So, it will be seen that the testimony as to damage caused by placing these structures upon the land was limited to cover only excess damages that might have resulted by reason of the operations of the defendant on lands other than those of the plaintiff.

Counsel expresses the belief that the first interpretation placed upon said lease by the court was correct but insisted that notwithstanding the language used (and in part quoted above), the court erred in permitting testimony of this damage and went beyond its first interpretation.

An examination of the entire record covering this feature of the damages will show that this character of testimony was limited to the one proposition only

of showing excess damage and the court in its instructions to the jury carefully guarded such testimony and restricted its application in no uncertain terms to damages, if any, caused to the land by reason of the structures under consideration, over and above any injury or damage that might have resulted had defendant's operations been confined to the land in question.

The instructions of the trial court upon this feature of the case are so explicit that we take the liberty to quote them in full. The court said:

“As the court and the law construes the lease, this would compel the defendant to pay for any damage to crops and fences, no matter whether necessarily inflicted in attempting to find and dig oil from this land or not, but it does not compel the defendant to pay for any injury to the land consequent upon reasonable pursuit in this land of the oil that was supposed to be there, and any reasonable buildings and derricks, a pumping-plant, pipe-lines, telephones and the like for the purpose of taking the oil out of this particular land. No one could call that—the results of those operations—damages, and the party did not have that in mind. They were contracting that he should actually come in and do that variety of work, Franz, for the benefit of them both. But while this lease justified the defendant, as the successor of Franz, in erecting upon this land any reasonably necessary structures for finding and taking of oil out of this land, and that would include all such roads as were reasonably necessary, any pipe-lines reasonably necessary, pump-

ing plant and telephone, it wouldn't justify the defendant in making this land the basis of operations upon surrounding lands that the defendant was engaged in taking oil from; and if the defendant did make use of this land as a basis of these operations elsewhere, and if by reason of that fact it inflicted greater injury upon the land than was the natural consequence of its operations upon this land, why, for that excess injury it would be liable to the plaintiff as any other trespasser would have been. It is not a matter of contract so far as those damages would be concerned because the contract did not provide that the defendant might inflict any such variety of injury upon the land." (Tr. pp. 145-46-47).

And again:

"When we come to the land, then this is the situation in respect to that: It does appear that roads were built upon the land by the defendant, and its claims that those roads were necessary for the development of the oil within the plaintiff's lands. The plaintiff says no, these roads were really built before there was any oil development on this land, built to enable the defendant to develop other lands and were unnecessary for the Plaintiff's lands. So with the pipe-lines and the pumping plant. The plaintiff insists that they were more extensive and larger than would have been necessary for a reasonable development of its lands. You may remember, however, that when this lease was entered into and the defendant proceeded to explore the land for oil, or getting ready for it, no doubt both parties did not antici-

pate that the production would be as small as it was up to the present time, and I think the lease still continues there may be future development. If the defendant overbuilt its plant, yet if it built it in good faith for the development of this land, it is not responsible because it now turns out that the plant is larger than the necessities of the land so far appear to justify. Another thing, if it did build a larger plant than is necessary in the way of pipe lines, oil and water, and pumping plant, that alone does not make the defendant liable for more than nominal damages unless they increase the burden upon the land, increase the injury to the land. For instance, let it be assumed that the defendant consciously built a pumping plant intended to serve surrounding territory as well as this land and larger than it would have built for this land alone, if the larger plant does not injure the land any more than a smaller plant would injure the land, then the plaintiff is not entitled to any substantial damages merely because the defendant built it too large for this land. In other words, there must be damage before the act of the defendant can confer upon the plaintiff a right to collect damages. So with pipe-lines and other instrumentalities.

“As before stated by the Court, any damage to the land itself, due to the defendant's operations upon this land by virtue of the lease, was not within the contemplation of the parties that the defendant would pay for them. They expected that some injury, occupation of the land would follow the contract between them at least, but any damages, if you can find any, to the

land that are due to the defendant's operations in the surrounding territory, that would not have been inflicted but for the defendant's operations in the surrounding territory, you are directed to allow those to the plaintiff, as he is entitled to them.

“Now, when you come to determine the damage to land, the rule of damages laid down by the law is this: In order to arrive at what the land has suffered from a monetary standpoint you take the value of the land before the injury was done to it and the value of the land after the injury was done to it, and the difference, if any, will be the money value of the damages that have been inflicted. For instance, if you should find that this land was worth five thousand—simply taking that as an illustration—five thousand dollars before the defendant operated upon it and did the things upon it that it is contended it did, and if you find that the land is now worth let us say two thousand dollars—only for illustration—the damages to the land would be the difference between five and two, or three thousand dollars. But that is not all; then it would be for you to determine how much of that is an excess due to the operations of the defendant on the surrounding territory instead of upon the land of the plaintiff itself. If the damages would be as great from the operations of the defendant upon the land itself as they are in connection with the operations of the defendant on the outlying lands, then the defendant's operations in contemplation of law haven't injured the plaintiff at all and he wouldn't be entitled to anything for that; but it is for you to say whether the outlying

operations added to the damage on the land and, if so, how much." (Tr. pp. 149-50-51).

It is true that witnesses, Lands and Sontag, testified in substance that the various structures placed upon the Fifer tract were necessary for use in the development of said property and caring for the production therefrom. Yet, we believe the whole of the testimony of these two witnesses, when taken in connection with all the facts and circumstances surrounding the operations of defendant company show conclusively that much of the damage to the land was the result of the operations on other lands and not incident to or reasonably necessary in the work prosecuted under the instant lease.

It will be remembered that the first operations were commenced by defendant on the Charles tract on November 21, 1919; that various operations on other lands were carried on between that date and the time actual development work was undertaken on the Fifer tract—in May, 1921. In fact, the testimony shows that practically all of the roads were constructed long before any work on the Fifer tract was undertaken.

The witness, Sontag, testified that no less than six wells were drilled east of the river and four wells west of the river (Tr. page 119). The defendant Fifer testified that all of the materials and supplies used in the drilling of the wells to the west of the river were hauled through his place and that most of the material used in the drilling of the wells east of the river were hauled through his place. Landz testified

that three wells were drilled east of the river and that operations for three wells across the river had been started before any work was undertaken on the Fifer lease. (Tr. 97). The testimony also shows that the pumping station constructed upon the Fifer tract was not necessary and was not used in drilling the two wells upon the Fifer tract by the defendant. The witness, Landz, testified that the water for use in drilling the Franz-Fifer No. 1 was a gravity line from the O'Day well and that the pumping station was not used (Tr. page 100), and that in drilling the Franz-Fifer No. 2, water was obtained, not from the pumping station, but from the Charles No. 1 (Tr. page 101); that plaintiff's fences were destroyed and plaintiff forced to abandon his farming operations long before work was ever started on his property.

There is other testimony similar to that just referred to which bears out the contention of plaintiff that the land in question was used as the basis of operations of defendant in the Cat Creek field and that much of the damage done to the lands was by reason of the use thereof and not in connection with the development of the Fifer tract or in securing the production therefrom.

Certainly, plaintiff in error will not be heard to say that plaintiff below was not entitled to recover for injury done to the leased premises by reason of the extensive operations carried on by plaintiff in error on other lands. In no sense of the word

was the use to which said lands were put reasonably necessary or incident to the development and operation of the Fifer tract.

The position of plaintiff in error is most peculiar. It says in effect—I made use of your land for one and one-half years in carrying on my general operations in the Cat Creek field before I started work on your land; drilled a number of wells on other lands; hauled the material through your land; tore down your fences; built roads; permitted my stock to feed upon your crops, but because you can't point out to a nicety and to a cent what damage resulted from these operations and what damage resulted from my operations upon your land, you cannot recover.

The evidence introduced on behalf of plaintiff and defendant showed the actual conditions as they existed and the ultimate question, the amount of damage, was for the jury to determine under proper instructions from the court. Counsel insists that plaintiff did not segregate the damage. As stated above, the facts were shown and under no rule of evidence could plaintiff go further. There can be no doubt that plaintiff would not have been permitted to show by witnesses, expert or otherwise, what part of the damage was caused by the operations of the defendant upon other lands and what part resulted from the development of the Fifer land, or what buildings, tanks, pipe lines, etc., were necessary. The determination of that question was strict-

ly the province and office of the jury.

The Supreme Court of Ohio in passing upon a question very similar in every respect to the one here presented, said:

“The trial court overruled the objection of the plaintiff, allowing the defendant to propound to several witnesses this question, ‘what buildings or structures were necessary to be placed upon this lease in order that the same might be properly operated for oil and gas?’ The Circuit Court held that this was prejudicial and for that reason, reversed the judgment of the court of common pleas, and remanded the case to that court for a new trial. Thus far the proceedings by the Circuit Court were strictly correct. The question called upon the witness to answer, in regard to one of the ultimate facts which it was the province of the jury only to answer; but the jury cannot be aided by the opinions of those who are not triers of the facts as to the very issues which the jury is itself sworn to determine from evidence.”

Fowler vs. Delaplain, 87 N. E. 260.

See also:

Ohio and Indiana Co. vs. Fishbourn, 56 N. E. 457.

Railroad Company vs. Schultz, 1 N. E. 324.

In the case of Fort Pitt Gas Company vs. Evansville Contract Company, 123 Fed. (C. C. A.) 63, the Circuit Court of Appeals, Third Circuit, in pass-

ing upon the admissibility of opinion evidence used the following language:

“We concur in the ruling of the court below that the pipe was a lawful structure, but that the gas company was bound to exercise such care, both in laying and maintaining it across the river, as men of ordinary prudence would exercise to avoid its causing damage to those engaged in navigation. Whether the defendant had fulfilled this obligation was a question for the jury; but the testimony of Hollerback, to the effect that there would have been danger of a steamboat striking the pipe, if coming ashore, was not relevant. Apart from the fact that it referred to a steamboat, and not to a dredge, it was evidence, not of facts, but of opinion, and of opinion touching a point which, without peculiar knowledge or exceptional experience, could readily be understood and properly dealt with.”

The rule that the opinion or conclusion of a witness is not admissible in evidence when all the facts and circumstances are shown and described so that the jurors may readily form a correct conclusion therefrom is so well established that we deem further authority wholly unnecessary.

We believe that under the clause “or other damages” as used in the written portion of said lease, plaintiff was entitled to recover any and all damage to the leased premises resulting from the construction of roads, power stations, tanks, pipe lines, etc., whether necessary in the development of said prem-

ises or not. If our interpretation is correct, then the testimony of the character under consideration was admissible and should not have been restricted by the trial court merely to show excess damage as the result of the operations of defendant upon other property and defendant was decidedly favored in the interpretation placed thereon by the trial court and can be heard to complain.

Plaintiff in error next insists that the testimony is insufficient to justify the verdict. A review of the record will disclose that there is ample evidence to support the verdict, in fact we believe the jury under the evidence introduced, would have been justified in giving plaintiff a much larger amount.

A brief resume of the testimony will show that the position of plaintiff in error is not tenable. Taking up first the testimony touching the destruction of the fences. The plaintiff, Fifer, testified that at the time the defendant commenced operations his fences and gates were in first class condition; that in hauling back and forth over his place, the Franz people opened the fence or gates "sometimes they did not go through the gates at all, they would go through a fence, if they did, I don't think it was ever up twenty-four hours after that. They tore down first on the north and then south diagonally across the place. The fence now is practically all open everywhere, some gone, removed. In the early operations in the first place they opened the fence on the northeast and came diagonally across to their camp

to the south, opened it then in two places and then there were the gates. You know they haul those big camp wagons and left fence down, had to go north and south and moved it before they got their big camp built. After they would take down the fences they were never repaired and put back. I have gone over it a good many times and did that. Lots of times the wires were tacked down to the lower post when they drove over it first before other teams came in driving over it, and they would hook into that wire and pull it every old place around over the place. In the spring of 1920 the fence was down different places around the place. In the spring of 1920 before I commenced farming operations my time was spent in repairing fences and hunting cattle and fixing fences and gates. In the spring of 1920 I put in a full and complete new fence about sixty rods of the coulee where all the wires and posts were gone. I put that in the second time." (Tr. pages 38-39).

"Fences in the spring of 1921 were torn down entirely and the entire tract of land was open to the range stock. Along about March 1, 1921, I went down on that piece of forty and fixed up the fences and drove the stock out. I could not do anything with reference to the other portions of the fences. The roads were all mixed up and cut up and I didn't try to do anything." (Tr. 42).

"The reason for the loss of my crop in 1921 was through the fences being torn down and the roads and the traffic and business through the place and the range stock. In the spring

of 1922 there were no fences kept up around the outside." (Tr. page 43).

The witness, Landz, who testified for the defendant corroborated the testimony of Fifer in practically every detail in so far as the destruction of the fences by the Franz Corporation was concerned.

"I know that during the time that we were drilling the Charles and O'Day wells that the fence on Mr. Fifer's land on the west end and on the south side was down in a number of places, left down for the purpose of crossing over the land, and the fence on the south side, immediately surrounding our operations on the Charles lease, was practically destroyed; that is, on the north of the Charles and south line of Mr. Fifer's tract, practically half a mile, was destroyed. At one time I had forty teams hauling material back and forth. The most of those teams went in on this other road and came down by Mr. Fifer's house. I do not mean to say all of those teams went through the gate, and when the teamsters did go through the gates they were not always closed; we closed them and watched them and tried to keep them closed, but it was impossible to do it. During the spring when the roads were bad, we got through there the best way we could. If we could keep on the road, we did, but if it was necessary to take down a fence to get through, we did that. * * * I remember that during the summer of 1920 Mr. Fifer had trouble with stock on his pasture. The horses that were used by the Franz Corporation were pastured more on Mr. Charles' land than on Mr. Fifer's. Some of the horses would get

over on the Fifer land. The fence that separated the Charles tract from the Fifer land was practically destroyed, though he had a very good fence around his meadow at that time." (Tr. 99, 100).

On direct examination this witness testified that the gates were kept closed so far as the Franz Corporation was concerned and sought to leave the impression that the fences were kept up until the stampede and that the stampede was responsible for the destruction of the fences. However, a reading of the testimony above quoted, shows conclusively that the fences were destroyed and removed by the Franz Corporation and there is no testimony of any kind or character that the stampede, so-called, was responsible for the loss of any of the fences in question and no testimony that the people who used the land and roads, as testified to by Landz, ever tore down or destroyed one foot of fence on the Fifer tract. Landz testified that during the time that the Charles and O'Day wells were being built that the fences on the west and south side were down in a number of places and it will be remembered that these wells were drilled during 1920 and 1921, and before actual operations were started on the Fifer land.

In the light of the testimony, not only of plaintiff, but that offered by defendant, we are at a loss to understand how counsel can contend that the evidence is insufficient to show the destruction of the fences by the Franz Corporation.

If, then, the defendant was responsible for the destruction of the fences as we contend, it must follow that it is liable for the loss of crops as a result thereof. On this point the plaintiff Fifer testified that about thirty acres in the east forty was under irrigation and growing blue-joint hay and about five acres across the river was growing alfalfa (Tr. 36), and thirty acres in the south forty was seeded to sweet clover (Tr. 36) in the fall of 1919 and that in the spring of 1920 there was a good stand of sweet clover (Tr. 40); that from the field of blue-joint he cut in 1920, 45 tons (Tr. 40), but did not get a second crop; that the second and third crops on the tract across the river were lost and would have produced about eighteen tons; that he did not get a crop from the thirty acres in sweet clover (Tr. 40); the value of the pasturage for the entire tract was \$150.00 per year.

As to the year 1921, he testified that the blue-joint would have produced, but for the destruction of his fences, thirty to forty tons (Tr. 42); the thirty acres of sweet clover would have produced one ton to the acre (Tr. 42) and the tract across the river would have produced two tons to the cutting and three cuttings (Tr. 43).

As to the year 1922, he testified that in his opinion the thirty acres of sweet clover would have produced two crops of a ton to a ton and a half per cutting. The blue-joint would have produced forty to forty-five tons and the tract across the river would have

produced about the same as in 1921—two tons per acre per cutting (Tr. 43, 44).

The witness, Al Dixon, a farmer living about a mile north of the land in question testified as a witness for plaintiff that in his opinion the thirty acres in clover on the south forty would have produced one ton to the acre in 1920 (Tr. 64); that the alfalfa across the river would have produced another crop of one ton per acre and that there was a chance for a third crop (Tr. 64); that in 1922, in his opinion, the blue-joint would have produced thirty-five to forty tons; the tract across the river would have produced two and one-half to three and one-half tons per acre (Tr. 65) and the sweet clover in the south forty would have produced a ton or better per acre; that the value of the pasturage upon said place was \$1.00 per acre per year.

The witness Routin, a farmer living about two and one-half miles from the Fifer tract testified that he knew the land in question and that the patch of alfalfa across the river would have produced three crops ranging from two and one-half tons down to one ton or less (Tr. 73); that the sweet clover in the south forty would have produced in 1920 a ton to a ton and a half per acre; that in the year 1921, in his opinion, the tract east of the river would have cut three or four tons to the acre in three cuttings (Tr. 74); the thirty acres in the south forty in sweet clover would have cut one to two tons per acre (Tr. 74); the blue-joint would have produced thirty-five to

forty-five tons that year (Tr. 73). In 1922, in his opinion, the blue-joint would have produced a ton and a half per acre; the tract across the river four or five tons and the thirty acres in sweet clover would have produced from one to two tons per acre. This witness also testified that the value of the pasturage for said land was \$1.00 per acre per year.

The testimony shows that the market value of alfalfa and sweet clover during the three years in question was \$15.00 to \$25.00 per ton in the stack (Tr. 44, 66, 74), and the market value of blue-joint during those years was twice as much as alfalfa (Tr. 66, 75). There is also testimony that the market value of blue-joint in the vicinity during the years in question was as high as \$40.00 per ton.

The testimony also shows that the cost of producing and stacking, not including irrigating, was \$2.00 per ton (Tr. 44, 66), and the cost of irrigating \$50.00 per year. It will be remembered that the land under irrigation is irrigated from the flood waters of the coulee leading on to the Fifer tract.

The witness, Hilger, for defendant, testified that alfalfa in the country where he was engaged in farming, some twenty-five or thirty miles removed from the Fifer land, was worth during the years in question from \$6.00 to \$10.00 per ton (Tr. 133). Yet, it should be noted that the witness was testifying to a condition wholly different from that existing at the Fifer place. He was farming in an irrigated district where the stockmen raised their own feed

and usually aimed to raise only sufficient for their own needs (Tr. 134), while the Fifer land is in a stock country twenty-five miles from the nearest railroad station and his is the only irrigated place on the river.

The court's attention is directed to the further fact that no stockman or farmer operating in the vicinity of the Fifer land was called to controvert the price of hay as given by the witnesses for plaintiff or to question their estimate of the amount of hay that would have been produced during those years. It is significant that while the testimony shows that defendant's witnesses, Landz and Sontag, were in the field in charge of a large number of teams and no doubt buying hay during the period of time in controversy, they did not question the prices given by plaintiff's witnesses.

Witness Hilger placed a comparatively low price upon the value of the Fifer land on his direct examination, a value of from ten to fifteen cents per acre for grazing purposes. However, on cross examination this witness admitted that if the land was capable of producing the crops testified to by the witnesses for the plaintiff and of the value testified to, that the land would be of considerable value. In fact the value then placed upon the property was only slightly under the value given it by witnesses for the plaintiff. To like effect was the testimony of the witness Walter O. Downing, for the defendant.

Plaintiff in error argues that as to this feature of

the case, as in the matter of the fences, that the plaintiff did not segregate his damages and show what part was due to the acts of the defendant and what part was due to the acts of third parties. We submit that the contention is groundless and what was said in disposing of the question relating to the fences applies with equal force here. There is not one iota of testimony that any damage of any kind or character was caused to the crops growing upon the land by third parties and no testimony that any of the fences were destroyed by them. As heretofore set forth, the testimony is conclusive that the destruction of the fences is chargeable to the defendant.

Surely defendant cannot escape liability for its wrongful acts in destroying the fences surrounding the Fifer tract simply because after such destruction other people may have entered upon and across said land. If others did use the roads across the land they did so because of the wrongful act of the defendant. To say that any damage resulted to the crops or to the fences by reason of such use is merely a matter of speculation and conjecture and there is no evidence to support such contention.

It is the law, as plaintiff in error contends and as announced by the Supreme Court of Montana, in *Park vs. Grady*, 62 Mont. 246, and other cases cited, that a verdict of the jury based upon speculation and conjecture, cannot stand, but the law does not require that degree of proof which amounts to demonstration, moral certainty, or that degree of

proof which produces conviction in an unprejudiced mind being sufficient to sustain the verdict of the jury.

Reilly vs. City of Butte, 64 Mont. 355.

Whether the fences were destroyed by plaintiff in error or strangers, and whether the resulting loss of crops was due to the acts of plaintiff in error or others was one of the disputed facts. There was an abundance of evidence on this point and especially so when considered in connection with the admissions contained in the answer that it "opened some of the fences of plaintiff enclosing said lands" and the jury having found the facts adversely to plaintiff in error this court will not set up its judgment against that of the jury.

We believe that the court may properly assume that if other parties were responsible in any degree for the destruction of the fences or the loss of crops the defendant would have presented some evidence of that fact to the jury—in other words, the court will presume that the defendant presented the best evidence available.

Where there is substantial evidence to support one party's contention which was fairly submitted to the jury an appellate court will not on appeal from the judgment interfere with the verdict rendered.

Ball vs. Gussenhaven, 29 Mont. 321;

White vs. Baling, 41 Mont. 138;

Cohen vs. Clark, 44 Mont. 151.

Where there is a substantial conflict in the evidence an appellate court will not reverse the judgment of the lower court on the ground of alleged insufficiency of evidence.

- Tooms vs. Hornbuckle, 1 Mont. 286;
- Budd vs. Perkins, 6 Mont. 223;
- Cabbage vs. Schultz, 16 Mont. 14;
- Nelson vs. Great Northern Railway Co., 28 Mont. 297;
- Fearron vs. Mullens, 38 Mont. 45;
- Matheson vs. Connerly, 46 Mont. 103.

Plaintiff in error in computing the damage to fences or rather the cost of reproduction says that there were ten forties, where as a matter of fact in addition to the ten surrounding the outside of the land there was a cross fence separating the east forty from the main body and a fence following the course of the river to a point where the cross fences connected with the south line fences, making a total of at least twelve forties. In addition to the damage defendant in error is entitled to recover for losses and destruction of fences, there is an item of replacing and time of plaintiff in the effort he made to keep up the fences (Tr. 39, 42).

Counsel argues that the court erred in its instructions to the jury relative to the measure of damage for injury to the land and insist that the court should have instructed that the measure of damage was the cost of restoring the land to its former condition and cite cases in support of that contention.

We believe that the court correctly instructed the jury in this regard.

There was no testimony offered by the defendant to show that the cost of restoring the land was less than the difference in the value before and after the injury complained of. In the second place plaintiff in error did not request an instruction incorporating therein its theory on the question of the measure of damage and consequently cannot now complain.

We believe the burden of proof was upon the defendant.

In the case of Zienbarth vs. Nye, 42 Minn. 541, 44 N. W. 1027, the trial court instructed the jury that the measure of damage for injury to the property was the difference between the value of the property before and after the injury. The defendant excepted to the instruction but offered no instruction on the point and on appeal insisted that the true rule was the cost of restoring the land and not the difference in the value.

In sustaining the instruction the Supreme Court said:

“But, if counsel thought that witnesses were making their estimates on an erroneous basis, it was for him to ask the court to instruct them on the point, or develop their mistake on cross examination; or, if he thought that the cost of restoring the land to its former condition would be less than the injury to the value of the land from letting the ditches and embankments re-

main, it was for him to show it. The court could not assume this to be so, in the absence of proof."

See also

Karst vs. Railroad Company, 23 Minn. 401.

In the case of Hartshorn vs. Caddock, 31 N. E. (N. Y.) 997, at page 999, the court having under consideration this identical question, said:

"When, as in this case damages are to be assessed upon one of two methods, according to the circumstances, and plaintiff's proof is by one of these methods only, and the defendant failed to supply the other mode of proof, which may be more favorable to him, or to raise any question as to the failure of the plaintiff to supply it at the trial, an appellate court ought not to reverse the judgment, especially in a case like this, where there is nothing to show, and no claim ever made, that the other theory of damages would be more favorable to the defendant."

And in the case of Mauda vs. City of Orange, 72 Atl. (N. J.) 42, at page 743, the Supreme Court of New Jersey said:

"The defendant now urges that it was incumbent upon the plaintiff to introduce evidence as to the diminution of value, so that the jury might be allowed to decide which amount was the less. In this we think the defendant erred. The plaintiff substantially took the position that

the least expensive way of compensating for the injury that had been done was to restore the property to its former condition. If the defendants disputed that, they had the right to introduce evidence and show that the diminution in value was less than this cost."

Citing with approval the case of *Hartshorn vs. Caddock*, 31 N. E. 997.

The defendant did not introduce testimony in support of their theory and neither did it request an instruction to the jury incorporating this method of determining damage.

Error cannot be predicated on the failure of the court to charge the jury as to an issue raised in the case when it does not appear that the court was requested to charge the jury as to such issue.

Carter vs. Carusi, 112 U. S. 478.

Courts are not inclined to grant a new trial merely on account of an ambiguity in the charge of the court when it appears that the complaining party made no effort at the trial to have the point explained.

Tweeds Case, 16 Wall, 504;

The Sebyl Case, 4 Wheat, 98;

Baltimore and P. R. Co. vs. Mackey, 157 U. S. 72.

When the instruction is correct so far as it goes, and the only contention is that it did not go far enough, such contention cannot be taken advantage

of on appeal, unless the attention of the trial court was called to the omission and request made for more explicit instructions.

Chicago Ry. Co. vs. Healy, 86 Fed. 245
(C. C. A.).

Defendant cannot complain of an omission to instruct the jury as to the measure of damages when he failed to request an appropriate charge.

Texas Ry. Co. vs. Cody, 67 Fed. 71 (C. C. A.).

The trial court cannot be put in error because an instruction fails to cover every feature of the case. It is the duty of one who says that an instruction is not broad enough to offer one which is.

Nelson vs. Boston & N. Co., 35 Mont. 223;
Heilman vs. Chicago, Milwaukee & St. Paul
Ry. Co., 45 Mont. 406.

The testimony offered on behalf of plaintiff meets the requirements of the law in every respect as to the degree of proof required in actions to recover damages for loss of crops. The probable production from the land was shown by men familiar with the land, the general conditions and every fact which would make their testimony admissible and sufficient to establish the loss. The market price was shown, the cost of producing, irrigating and harvesting was shown by competent evidence, the question was fairly

presented to the jury under proper instructions and the jury's findings should not be disturbed.

Counsel argues that the court committed error in sustaining objection to question propounded to the witness Landz. (Assignment of Error III, g). We submit that the question was not proper on redirect examination and consequently no error was committed in excluding the evidence. Further, there was no proper offer of proof made and the assignment should not be considered. Counsel set forth at some length, in the brief of plaintiff in error, the purported facts with reference to hauling supplies and materials to the camps. We submit that if these were the facts they should have been incorporated in a proper offer of proof in order that this court might determine from the record the question presented.

Assignment of Error III, j. deals with the exclusion of certain testimony which defendant sought to prove by the witness Sontag. We insist that this witness had not shown himself qualified to answer the question and that it was not proper redirect examination and no error was committed by the trial court. Plaintiff was not suing for the use and occupation or for the rental value of the land for the purposes to which defendant had made use thereof, but for damages to fences, loss of crop and injury to his land.

We have answered each and all of the assignments of error covered in the brief of plaintiff in error and we believe that we have shown conclusively that

the case was fairly tried and no reversible error of any kind committed.

The argument of counsel, contained in the last paragraph of their brief, on page 59, does not appeal to us in the least. This appeal is of as much importance to land owners in Montana who have leased their lands to oil companies for oil development as it is to the oil operators. These land owners and the people of the state are anxious to know whether an oil company can come to Montana, enter into a written contract and then entirely disregard it and force them into the courts to protect their rights. If these companies will not "live up" to their contracts then it is far better that the development of oil and gas in Montana be delayed and retarded and the oil permitted to remain in the ground, at least until such time as operators are found who have some regard for their contracts and the rights of the people with whom they deal.

We respectfully submit that the judgment and order appealed from should be affirmed.

Respectfully submitted,

FORD & CHOATE,
Attorneys for Defendant in Error.

